Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

WENDY GENNIMI, PETITIONER

v.

TOWN OF LEWISBORO, JAY FAIN, JAY FAIN & ASSOCIATES, MARGARET CLARK, JAMES NORDGREN, JACQUELINE DZALUK, JOSEPH DECAMINADA, FREDA HALPERN, MAUREEN MAGUIRE, P.J. ROSSI, AND WILLIAM CARGAIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in deciding the petitioner's case the federal courts were entitled to disregard findings of fact made on the same issues by a New York state court in a parallel state court action that was brought by the respondent Town against the petitioner and that was decided while the federal action was pending.

2. Whether the Town Wetlands law, which had previously defined town jurisdictional wetlands in reliance upon the definition of federal wetlands pursuant to the Clean Water Act and its applicable regulations, 33 C.F.R. § 328.3 (b), but which was amended in 2004 to remove two of the three federal criteria, that is, that the land be capable of sustaining wetland vegetation but not requiring that it actually sustain such vegetation, is void for vagueness.

3. Whether respondent Jay Fain, who was a private contractor illegally employed as a town wetland inspector in violation of New York Town Law §23, violated petitioner's Fourth Amendment rights by repeatedly entering upon her property which was posted with "No Trespassing" signs.

4. Whether the Second Circuit departed from established Fourth Amendment jurisprudence in holding that an illegitimate government official, Jay Fain, was entitled to invoke a "serious needs" exception to respond to neighbors' complaints and perform warrantless searches of the curtilage of the petitioner's home.

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The summary order of the Second Circuit Court of Appeals, the court below, Wendy Gennimi, et al. v. Town of Lewisboro, et al., 08-1543-cv was not published but included in App. A. The opinion of the U.S. District Court, Southern District of New York, affirming the Magistrate Judge's Report and Recommendation, filed on March 23, 2008, was not published but is included in App. D. The Magistrate Judge's Report and Recommendation was filed on March 4, 2008 and is included in App. F. The State Court decision was filed on August 29, 2007 and is included in App. G.

The Judgment of the U.S. District Court, Southern District of New York, is dated March 23, 2008. The Mandate of the Second Circuit Court of Appeals is dated September 8, 2009.

The Order of the Second Circuit Court of Appeals denying rehearing is dated August 31, 2009.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 29, 2008. That court's denial of the Petition for Rehearing En Banc was entered on August 31, 2009, App. B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED(see appendix)

Introduction

Since 2002, Wendi Gennimi has been embroiled in a dispute with the Town of Lewisboro, New York over regulation of her property, which the town claims to constitute a wetlands or wetland buffer. For the past eight years she has had to defend herself in court against an expansive interpretation of the town's Wetlands law – a strict liability civil and criminal statute that raises serious constitutional issues.

As a result of this dispute and other related civil and criminal charges filed against her by the town, Wendi Gennimi was fined $25,000 in October 2004 and has been facing foreclosure of her home. While she is appealing a criminal conviction arising from the wetland charges and building code violations related to the installation of a fence around her property, she is still potentially subject to fines and mitigation fees that could exceed $425,000.

STATEMENT

Wendi Gennimi owns a house sitting on over two acres of land which she bought in 1997. Since the purchase, her husband has been doing periodic renovation work on the house to address severe structural problems. Even town officials have recognized that the house had structural defects that "presented a health and safety hazard." Although there had been complaints from neighbors against Gennimi about various alleged wetland and building code violations since 2000, former wetland inspector William Cargain, a full-time town employee, refused to charge Gennimi with wetland violations. Wetland Inspector

Cargain was accused by some town officials of being too lenient because he refused to issue summonses against alleged wetland violators such as Ms. Gennimi.

On August 1, 2002, the town hired Mr. Jay Fain and Fain & Associates, as the town's Wetland Inspector . In appointing Mr. Fain as the Wetland Inspector, the Town did not pay him a monthly salary like other town employees, such as Mr. Cargain, but let him bill for his services on an hourly basis as an "independent contractor" for time spent on all wetland matters. In hiring Mr. Fain, a resident of Connecticut, as wetlands inspector, the town violated New York State law ([Town Law Section 23 and Section 3 of the Public Officers law]) which mandated that the wetland inspector be a town resident, *i.e.*, a resident of the Town of Lewisboro.

A. The State Court's August 29, 2007 Decision

Immediately after being appointed Wetland Inspector, on the basis of neighbors' complaints, Mr. Fain searched Ms. Gennimi's property and charged her with numerous wetland violations. Mr. Fain testified at a hearing before the Planning Board on November 26, 2002 and presented pictures which he took of the property. After the hearing, the Planning Board convicted Ms. Gennimi of four charges of wetland violations and fined her $1,500 and ordered her to implement a planting scheme costing tens of thousands of dollars that was to be supervised by Mr. Fain. On April 17, 2003, Mr. Fain issued a second summons charging Ms. Gennimi with wetland violations for failing to implement the planting, and testified at a hearing before the Planning Board on July 10, 2003,

where he recommended that Ms. Gennimi be fined $425,000. Mr. Fain also testified that he did not know where the wetland boundaries were on Ms. Gennimi's property, but that the Gennimi house could be used as a "benchmark." On July 25, 2003, on the basis of Mr. Fain's testimony, and pictures obtained from the searches, the Planning Board again convicted Ms. Gennimi of wetland violations for failing to finish the planting scheme. On June 17, 2004, after repeated searches of the property around her house, Mr. Fain again charged Ms. Gennimi with wetland violations arising from her husband's construction of a fence around the property to prevent searches by town officials. Mr. Fain also issued stop work orders preventing Ms. Gennimi from completing the repairs on her house even though, as noted above, the house had severe structural problems and was deemed a safety hazard. From 2002 until his resignation in December 2006, Mr. Fain repeatedly searched and took pictures of Ms. Gennimi's property and the curtilage of house at the urging of neighbors, in spite of her protests and the "no trespassing" signs she posted at the property's entrance. His testimony and pictures were evidence that were presented at Planning Board hearings to obtain convictions.

On October 26, 2004 the Planning Board convicted Ms. Gennimi of wetland violations for the construction of the fence and fined her $25,000. In early 2005, Mr. Fain again charged Ms. Gennimi with wetland violations - this time based on the fact that she had moved out of her house the previous year and a sewer pipe broke during the winter while the house was unoccupied - and recommended that criminal charges be filed in town justice court. As her house went into

foreclosure, Ms. Gennimi filed an action in federal district court and moved for a preliminary injunction against the town's enforcement of the fines and the Wetland laws against her. At a July 21, 2005 hearing, District Court Judge Charles Brieant granted Ms. Gennimi a stay of the $25,000 fine. Immediately afterward, on September 15, 2005, the town brought misdemeanor charges in town justice court against Ms. Gennimi for violating stop work orders and repairing a deck attached to her house without a permit, the town having withheld the permit because of the wetland convictions. In July 2008 Ms. Gennimi was convicted of misdemeanors and is presently appealing the convictions. In February 2007, while the federal action and the criminal charges were pending, the town brought civil charges of wetland violations against Ms. Gennimi in New York State Supreme Court, which made findings of facts and conclusions of law that those charges were identical to wetland issues pending before the federal district court. On August 29, 2007, the New York State Supreme Court declined to entertain the Town's parallel state suit. App. 46a. On June 17, 2008, the Appellate Division dismissed the Town's appeal. App. 47a.

B. The District Court's March 24, 2008 decision

On November 30, 2007, Gennimi filed a Request for Judicial Notice of the State Supreme Court decision. However, on March 4, 2008, the Magistrate Judge issued the Report without considering therein any collateral estoppel effect of the New York State court's findings of fact and conclusions of law, although on March 4, 2008, the same day that the Magistrate Judge issued the Report, the Magistrate Judge stated that

"the Court will take [the State decision] into consideration". By summary order, the District Court affirmed the Report on March 24, 2008, a few days after Ms. Gennimi filed her objections. The District Court did not make any *de novo* review. By summary order dated May 29, 2009, the Second Circuit Court of Appeals affirmed the district court's summary decision.

BASIS FOR FEDERAL JURISDICTION IN DISTRICT COURT

Jurisdiction of the District Court was invoked pursuant to Title 28 U.S.C. § 1343(3) which confers original jurisdiction on United States District Courts over suits to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. The petitioner further invoked the jurisdiction of the District Court pursuant to the supplemental jurisdictional provisions contained in 28 U.S.C. § 1367.

According to the District Court, which affirmed the Magistrate Judge's Report and Recommendations by summary order, since the Gennimi backyard abuts New York state wetlands, the Town Wetlands Law is not unconstitutionally vague as applied to her. However, she was convicted of charges of wetland violations not involving any state wetlands - in spite of Mr. Fain's repeated notifications to state inspectors - but instead involving the construction of a fence in the immediate vicinity of her home, which Mr. Fain claimed is a wetland "buffer' subjecting her to the town

Wetlands law. By summary order, the Second Circuit affirmed the district court's decision.

REASONS FOR GRANTING THE PETITION

The decision of the Second Circuit Court of Appeals conflicts with the decisions of a New York state court and other U.S. Courts of Appeals on the same important matter (Rule 10(a)) and decides important federal questions in a way that conflicts with relevant decisions of this Court (Rule 10(c)).

There are three reasons for granting the writ. First, by affirming the judgment of the U.S. District Court, the Second Circuit Court of Appeals eroded and undermined the full faith and credit afforded to state court judgments' findings of fact. Second and third, the Second Circuit undermined the protections afforded citizens of the United States by the Fourth and the Fourteenth Amendments to the U.S. Constitution. Specifically, the decisions of the District Court and Circuit Court of Appeals will encourage governmental agencies to apply broad constructions of the "wetland" definition and the "serious needs" doctrine to override the people's Fourth and Fourteenth Amendment rights whenever such agencies find it expedient.

I. THE DECISIONS OF THE COURTS BELOW CONFLICT WITH THE FINDING OF A STATE COURT AND FAILED TO ACCORD FULL FAITH AND CREDIT TO THE NEW YORK STATE COURT'S FINDINGS OF FACT REGARDING IDENTICAL WETLAND CLAIMS

The decisions of the courts below represent a significant and unwarranted departure from the New York State Supreme Court's decision in a related case, insofar as the New York court made findings of fact adverse to the town six months prior to the Magistrate Judge's issuance of his Report and Recommendations.

A. The Town voluntarily initiated a state court action while the federal action was pending

After District Court Judge Charles Brieant issued a stay of the $25,000 fines on July 21, 2005, and while discovery was being conducted in federal court, the town initiated a parallel action in State Supreme court in February 2007 accusing Ms. Gennimi of wetlands violations and again seeking enforcement of the Wetlands law. Town of Lewisboro v. Wendy Gennimi, Index No. 2771/07(Westchester Supreme Ct. 2007). On August 29, 2007 the State Supreme Court issued a decision staying the town's civil action based on the following findings of fact and conclusions of law, which have collateral estoppel effect since the Town failed to appeal (App. Decision, App. H):

> Upon the foregoing papers, it appears that on July 15, 2004 Defendant Gennimi was charged by the Lewisboro Planning Board (the "Planning Board") with **constructing a fence without a**

> **permit in violation of the Town of Lewisboro Wetlands Law.** After several hearings before the Planning Board, on October 26, 2004, the **Planning Board determined that Gennimi had violated the Wetlands Law and imposed fines totaling $25,000.** In July 2005, the Defendants joined a federal action (pending before United States District Judge Charles L. Brieant) as party-plaintiffs. In that action, the Defendants herein challenged the constitutionality of the Wetlands Law on its face and as applied to them and sought to enjoin the Town of Lewisboro from enforcing the fines. **On July 21, 2005, the Federal Court issued injunctions staying enforcement activity for the balance of the action and by a Memorandum and Order dated November 10, 2005 directed that discovery should proceed on the constitutional claims.**
>
> **All of the foregoing notwithstanding,** on February 16, 2007, Plaintiff [Town of Lewisboro] commenced the instant action...

State Supreme Court decision, August 26, 2008 (emphasis added). Judge Gerald Loehr of the State Supreme Court reviewed the Planning Board's file, including its October 26, 2004 decision and clearly held that the Planning Board fined Ms. Gennimi $25,000 for "construction of the fence without a [Wetlands] permit". State Judge Loehr reviewed the late Judge Brieant's July 21, 2005 injunction staying the fines and all other actions pending in town Justice Court and declined to enforce the Wetlands law against Ms. Gennimi or enjoin her from construction of the fence.

Thus the state Supreme Court's decision is notable for the fact that it declined to assert jurisdiction over purported charges brought by the town alleging violations of "state" wetlands. In fact, the State has never charged or investigated Ms. Gennimi with or for any wetland violations. The State Supreme Court's findings of fact also flatly controverted the Report's finding that "the Planning Board *never* determined the innocence or guilt of plaintiff [Gennimi] in the instant action." The District Court's and the Second Circuit's summary order adopting the Report's contrary findings of fact and ignoring the prior State Supreme Court's fact findings failed to afford full faith and credit to the State Supreme Court's opinion. *See* U.S. Const., Art. IV, § 1, 28 U.S.C. § 1738.

B. The State Court Decision has Preclusive Effect

In summary, while discovery was being conducted in the district court, the Town filed a new action in state court to enforce the Wetlands Law to seek payment of fines in addition to the $25,000 fines and prospective fines of $425,000. The Town upped the ante to make an end-run around Judge Brieant's July 21, 2005 order staying enforcement of the $25,000 fines, in the midst of the federal action, and would have obtained collateral estoppel with double jeopardy effect had it been successful. However, on August 29, 2007 the State Supreme Court held that *"[a]fter several **hearings**...the Planning Board determined that Gennimi had violated the Wetlands Law and imposed fines totaling $25,000"* and found that the Planning Board imposed those fines against Gennimi for ***"constructing a fence without a permit in***

violation of the Town of Lewisboro Wetlands Law". App. 45a. Six months later, on March 4, 2008 the Magistrate Judge issued a Report containing findings of fact that flatly contradicted the August 26, 2007 State Court's decision, by stating in the Report that "the planning board *never* determined the innocence or guilt of the plaintiffs in the instant action," and that "Gennimi admitted to the allegations". App. 33a-34a.

Indeed, the Report totally ignored the prior state court factual findings and made *de novo* contrary factual findings by stating as follows:

> Wendy Gennimi has been assessed civil penalties totaling $25,000 as a result of four separate violations, each violation averaging less than the $7,500 penalty allowed by the [Wetlands] statute. The total figure of $25,000 was only assessed after Ms. Gennimi's repeated failure to remedy her initial infraction and bring her property into compliance with the Towns' wetlands law.

Report, App. F, p. 26a. By affirming the district court's summary order that adopted the Report, the Second Circuit completely disregarded this Court's direction to the lower courts that they defer to state courts' findings of fact. San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 232, 125 S.Ct. 2491 (2005). Under the Full Faith and Credit Act, the New York Supreme Court's findings of fact are binding on the federal courts. Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411 (1980) (collateral estoppel prevents federal court relitigation of issue of fact adjudicated in state court); *see also* Lucas v. South Carolina Coastal

Council, 505 U.S. 1003, 120-22 (1992) (in regulatory takings case, Supreme Court defers to factual findings of state court). Instead, the Second Circuit, by summary order, unquestionably adopted the Report and substituted its own judgment for the state court's. Indeed, the Second Circuit condones the town's two bites at the judicial apple, first by bringing charges of wetland violations in state court, and after being unsuccessful in that forum, relitigating the identical claims in federal court in violation of the Full Faith and Credit Act, 28 U.S.C. § 1738 (the "Act"). The Act is a central component of the doctrine of federalism that requires federal courts to defer to state court findings of fact. Such deferral was especially appropriate in this case insofar as the town was the forum-shopping party who filed a parallel action in state court during the pendency of the federal action. The Second Circuit repeated the same mistake it made in Santini v. Connecticut Hazardous Waste Management Service, 342 F.3d 118 (2d Cir. 2003), *cert. denied on other grounds*, 125 S.Ct. 104 (2004) of giving the town's claims *de novo* review even where the facts of the federal and state claims are identical, and even when the town voluntarily instituted litigation of the same claims in state court.

Asides from the fact that this Court overruled Santini in San Remo, 545 U.S. 323, 125 S. Ct. 2491 (2005), unlike the claimant in Santini, the town respondents here were not involuntary litigants in state court. Accordingly, the town could have litigated the wetland issues in the federal forum had they not voluntarily filed a parallel case in state court against Ms. Gennimi. To allow the lower courts to make *de novo* fact findings concerning the same wetland claims that

the New York Supreme Court has already determined adversely to the town would unfairly penalize Gennimi and reward the town for forum-shopping. Indeed, when the Second Circuit affirmed what was in effect the District Court's reversal of the State Supreme Court's determination that the Planning Board fined Gennimi $25,000 for construction of a fence in violation of the Wetlands law, it departed from the guiding principles of the Full Faith and Credit Act set forth by this Court in Exxon Mobil Corp. v. Sabic, 544 U.S. 280, 125 S. Ct. 1517 (2005), and reiterated in Medelin v. Texas, 552 U.S. 491, 128 S. Ct. 1346 (2008) (State court decisions are binding upon the federal government over international treaties) . In view of the manifest error of the Second Circuit in failing to accord full faith and credit to a binding prior state court judgment, the Court should grant the petition for writ of certiorari, or consider summary reversal.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS BETWEEN THE COURTS CONCERNING WHAT CONSTITUTES A WETLAND

After hiring Mr. Fain as wetlands inspector in August 2002, the town amended its Wetlands law in 2004 to redefine "wetland" and thus gave maximum discretion to Mr. Fain to determine that much of the town is a wetland or wetland buffer subject to town jurisdiction. Mr. Fain never conducted any wetland delineation and admitted at hearings that he did not know the exact location of all wetland boundaries, thus requiring Ms. Gennimi, as well as numerous other accused violators, to map the wetlands on their properties as part of the penalty. Particularly at a July

10, 2003 hearing, when the Gennimis complained that they could not afford the thousands of dollars required to determine the wetland boundaries, Mr. Fain suggested that they could use their own home as the "benchmark" or wetland boundary, and thus under the Wetlands law, all land within a 150-radius of the home became a town jurisdictional wetland "buffer" subject to the similar regulations as town jurisdictional wetlands.

A. The Original Town Wetlands Law was a strict liability statute which adopted the Clean Water Act definition of "wetland"

Prior to the 2004 amendment, the town Wetlands law adopted the definition of "wetland" found in the federal Clean Water Act, which relies on two criteria, including soil composition (i.e., wet soil), and the presence of wetland vegetation. Specifically, the definition of "wetlands" in the predecessor statute, Local Law 3-1995, reproduced the federal Clean Water Act's ("CWA", 33 U.S.C.A. § 1251 et seq.) definition, as follows:

> WETLAND/FRESHWATER WETLAND - all areas that comprise hydric soils and/or are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, **and that under normal circumstances do support**, a prevalence of hydrophytic vegetation **as defined herein or by the Federal Interagency Committee for Wetland Delineation, 1989. Federal Manual for Identifying and Delineating Jurisdictional Wetlands, US Army Corps of**

Engineers, US Environmental Protection Agency, US Fish and Wildlife Service, and USDA Soil Conservation Service, Washington, DC. Cooperative Technical Publication, attached hereto as appendix A.

L.L. 3-1995, (bold parts are those that have been removed from the current Wetlands Law L.L. 1-2004).

The relevant CWA regulations define wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and **that under normal circumstances do support**, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b) (emphasis added). L.L. 3-1995 mandated that wetland delineations to determine the presence and extent of local wetland be conducted using the criteria set forth in the 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual), which is still being used by the Corps in federal wetland delineation. In general, the 1987 Manual defines land as a "wetland" when, under normal conditions: (1) the land is dominated by hydrophytic vegetation (plants that have the ability to grow, effectively compete, reproduce and/or persist in anaerobic soil conditions caused by inundated or saturated soil conditions); (2) the land has wetland hydrology (inundated or saturated to the surface for at least five percent of the growing season in most years); and (3) the land consists of hydric soils (soils formed under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part of the soil). Exactly as with the CWA, L.L. 3-1995 relied on field indicators to determine whether the land is

wetland by investigating the plants, water, and soil.

B. The 2004 Amended Wetland law removed the requirement that wetland vegetation be present and is a strict liability statute that is void for vagueness

The amended town Wetlands Law L.L.1-2004 remains a strict liability statute but removes all reference to the requirement that wetland vegetation be present, as in the Federal guidelines, and defines "wetlands" as follows:

> All areas that comprise hydric soils and/or are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation.

Wetlands Local Law 1-2004 § 217-2(B). Thus since January 1, 2004 the town has claimed that a town jurisdictional wetland is any area that has **one of** the following characteristics, regardless of size or geographical location:

> (1) hydric soils **or**
> (2) is inundated or saturated by surface **or**
> (3) is saturated by groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation.

Unless the area is "inundated" or physically "saturated by surface" with water for extended time so that it is obvious that it is "wet", a person of "ordinary intelligence," Grayned v. City of Rockford, 408 U.S.

104, 108, 92 S. Ct. 2294 (1972), could not possibly know what L.L. 1-2004 means by terms such as "hydric soil" or "a prevalence of hydrophytic vegetation" that under the town Wetlands Law converts his or her property into a jurisdictional wetland. The removal of "that under normal circumstances do support" makes the existence of a "wetland" depend on the presence of "hydric soil" or "groundwater" - conditions that are invisible and unnoticeable to a person "of ordinary intelligence"- instead of the visible "swamp" or "bog" mentioned by the district court in Orange Environment, Inc. v. County of Orange, 923 F. Supp. 529, 533 (S.D.N.Y. 1996). In other words, a homeowner's private property becomes a town-regulated wetland if the town wetland inspector determines that the property "may" support hydrophytic vegetation, without requiring any additional criteria either listed in the Federal Manual or the New York State Wetlands Delineation manual. Furthermore, even if the words "that under normal circumstances do support" had been retained in L.L. 3-1995, a "person of ordinary intelligence" simply cannot readily recognize whether his property has a presence of "hydric soil" or "groundwater" or "a prevalence of hydrophytic vegetation". The difficulty in knowing that one's property contains town-jurisdictional wetlands is exacerbated by the fact that, in contrast to the federal CWA which requires that an area be at least one acre and be connected to "navigable waters" to be a federal jurisdictional wetland, Rapanos v. United States, 126 S.Ct. 2208 (2006), or to New York State environmental law which requires that an area be at least 12.4 acres to be state-jurisdictional (ECL § 24-301), L.L. 1-2004 does not specify any minimum acreage, thus making any temporary puddle in a homeowner's property a

potential town jurisdictional wetland subjecting its owner to civil and criminal penalties at the wetland inspector's total discretion. By removing the reference to the Federal Manual and the requirement that an area under normal circumstances support certain types of wetland vegetation to be treated as a "wetland", the Wetlands law L.L.1-2004 dispenses with any guidelines on identifying wetlands and is so indeterminate that "ordinary [homeowners] cannot understand what is prohibited." Kolender v. Lawson, 461 U.S. 352, 357 (1983).

Secondly, "the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*. Colautti v. Franklin, 439 U.S. 379, 395, 99 S.Ct. 679 (1979). L.L. 1-2004 is a strict liability statute that leaves its enforcement to the total discretion of the town's wetland inspector. The Wetlands law vests virtually complete discretion in the hands of [law enforcement] to determine whether the[homeowner] has satisfied [its provisions]. Kolender, 461 U.S. at 358, 103 S.Ct. 1855. In other words, the Wetlands law's definition of "wetland" is is so "indefinite" that it encourages, and did encourage, arbitrary and erratic charges and convictions of Gennimi by inspector Jay Fain based on neighbors' complaints. Colautti v. Franklin, 439 U.S. 379, 391. Not only does the Wetlands law expansively define "wetlands" as any puddle regardless of size that "may" contain hydric or wet soil and dispense with any requirement that wetland vegetation be found and with all other state and federal guidelines for wetland delineation, it also defines a "buffer zone" of a 150-foot radius surrounding the purported "wetland" and makes the buffer subject to the same regulation as the

wetland. The term "buffer" is defined as follows:

> **L.L. 1-2004 § 217-2 Definitions; word usage**
> BUFFER AREA - The area extending one-hundred-fifty (150) linear feet along the surface, away from, and around the perimeter of the outermost boundary of a "wetland" or "watercourse".

Third, the removal from the "wetland" definition of the requirement that wetland vegetation be present on the land and the enactment of the 150 foot-buffer allowed Mr. Fain to convert much of the town into a "wetland" or "wetland buffer" subject to regulation, since it left him with complete discretion. Mr. Fain himself had never made any wetland delineation studies on Gennimi's property. Indeed, in charging Ms. Gennimi with violations, Mr. Fain claimed that the Gennimi home and backyard are in New York state wetlands or parts of the wetland "buffer". However, in spite of Mr. Fain's numerous calls to state wetlands inspectors, the state has never asserted any jurisdiction over the Gennimi's backyard or home. In 2002, 2003 and in 2004, Ms. Gennimi was convicted of wetland violations for building a fence around her home - to stop wetland inspector Jay Fain and other town officials from searching the property - which Mr. Fain claimed was located in the wetland or "buffer" and thus subject to the same criminal and civil penalties imposed on activities proscribed on town jurisdictional wetlands. Mr. Fain admitted that he originally brought charges against Ms. Gennimi pursuant to neighbors' complaints since he resided out of town and relied on neighbors' surveillance to enforce the Wetlands law.

C. The Second Circuit's definition of "wetlands" conflicts with other Circuits' definition

Further, the Second Circuit's decision approving the town's expansive application of the term "wetland" to any soil which might possibly support wetland vegetation and to a 150-feet radius to cover a purported buffer, created a conflict with other circuits which have required "wetland" to possess the three characteristics of vegetation, water and soil. Under the Second Circuit's summary order, any land could be a wetland if a wetland inspector decides that the land could "possibly" sustain wetlands vegetation without the need to prove that such vegetation actually could grow on such land. The situation is similar to that of Rapanos v. United States, 547 U.S. 715, 126 S. Ct. 2208 (2006), in which a closely divided Court found that the government's over-expansive reading of the Clean Water Act (CWA) had extended jurisdiction over and "engulfed entire cities and immense arid wastelands" as "navigable waters of the United States." In the town of Lewisboro, the town's amendment of the Wetlands law, the CWA counterpart, and its illegal appointment of an ineligible Wetland Inspector to enforce the Wetlands Law, has converted much of the town into a town jurisdictional wetland or wetland buffer area subjecting property owners to onerous burdens and criminal prosecutions in any land use, no matter how trivial.

In Rapanos, the Supreme Court addressed whether the wetlands at issue were "navigable waters" covered by the Clean Water Act, 33 U.S.C. § 1251, and whether the government had impermissibly extended

its regulatory jurisdiction under the Act. The plurality opinion limits federal authority over "navigable waters" to "those wetlands with a continuous surface connection to bodies that are 'waters of the United States'", so that there is no clear demarcation between 'waters' and wetlands. However, Justice Kennedy determined that the government's jurisdiction under the Act extends to wetlands that "possess a significant nexus to waters that are or were navigable in fact."*Id.* at 759 (internal quotations omitted). Given the various opinions in Rapanos, the circuits are likewise split. The Seventh, the Ninth and the Eleventh Circuits have followed the substantial nexus test set forth by Justice Kennedy. United States v. Robison, 505 F.3d 1208, 1221-22 (11th Cir. 2007); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999-1000 (9th Cir. 2007); United States v. Gerke Excavating, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006) (per curiam). The First, Sixth and Eighth Circuits have followed the dissent's instruction if either the plurality's test or Justice Kennedy's test is satisfied. United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006); United States v. Cundiff, 555 F.3d 200, 210-13 (6th Cir. 2009); United States v. Bailey, 571 F.3d 791 (8th Cir. 2009); *see also* United States v. Lucas, 516 F.3d 316, 327 (5th Cir. 2008).

Although this case does not involve federal wetlands, the Second Circuit's finding that any soil assessed to have the potential for, but not actual, wetlands vegetation, can be a local government's jurisdictional wetland is related to the ongoing conflict between the circuits concerning the application of the Rapanos opinion. In re Needham, 354 F.3d 340, 345-346 (5th Cir. 2003) ("Consequently, in this circuit the United States may not simply impose regulations over puddles,

sewers, roadside ditches and the like"). None of the circuits adopted the Second Circuit's holding that a wetlands need only exhibit characteristics of wet soil as defined in L.L.1-2004. In this case, to dispense with the requirements that a wetlands has to possess the three federal characteristics of soil, water and vegetation would allow regulation that would obliterate the distinction between what is dry land and what is wetland. Moreover, it is axiomatic that to allow government regulation of any land that could possibly support wetland vegetation, without any such vegetation visible to the naked eye and without any other criteria, would convert any property into wetland or wetland buffer subjecting its owner to strict liability. So long as a wetlands permit is required to use any such property, the local government can prosecute any homeowners over local land use as long as the local wetland inspector decides that the land could possibly grow wetland vegetation. If the local government can regulate all lands determined to be capable of sustaining vegetation, no matter if no vegetation is ever found on such land, there is virtually nothing that the local government could not regulate under the Wetlands Law. This was the flaw in the town government's arguments: they provided no logical stopping point to prosecutorial authority and converted a land use law into a strict liability civil and criminal statute that did not involve a commercial or economic regulatory scheme at all.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISIONS BELOW CONFLICT WITH OTHER CIRCUITS' DECISIONS AND THIS COURT'S DECISION IN CAMARA

The implications of suggesting Gennimi's house be made a wetland "benchmark" from which to determine the wetlands boundary become clearer in the context of Mr. Fain's continuous searches of the property pursuant to neighbors' complaints. Since the wetland inspector declared Gennimi's home to be in a wetland or wetland buffer, he was able to subject the home and its immediate vicinity to unlimited searches, regardless of the facts that he was illegally appointed and that the searches were initiated in response to neighbors' complaints without any basis in fact or law to believe that there was illegal or criminal activity requiring warrantless searches.

A. The lower court's decision departs from established Fourth Amendment principles by permitting *per se* illegal searches of Ms. Gennimi's property and warrants this Court's immediate review

On January 14, 2008, Town Attorney Jessica Bacal proclaimed to the Town Board in an open forum that the town's employment of Jay Fain as Wetland Inspector from August 1, 2002 to December 21, 2006 constituted a violation of State law because during that period Town Law §23 (a New York State statute) required that the Wetlands Inspector be a Lewisboro resident (which Mr. Fain was not). Since there is no factual dispute that Mr. Fain was a private contractor and was also an ineligible Wetland Inspector, the lower

courts should have found that all searches that Mr. Fain performed on Ms. Gennimi's property beginning on September 17, 2002 and continuing until 2006 violated her Fourth Amendment right to be free from an unreasonable warrantless administrative search. Mr. Fain admitted to searching the subject property numerous times over the years and taking pictures which he showed to Planning Board members at all hearings. The Minutes of the November 26, 2002 hearing stated:

> *He [Mr. Fain] displayed pictures of the rear of the site.*
>
> The Minutes of the October 12, 2004 hearing state:
>
> ***Exhibit C - Photograph taken byJay Fain depicting excavation of north side of residence takenJuly 2004.***
>
> *...Mr . Fain produced a photograph of the July 15, 2004 Stop Work Order which had been posted on the garage. He advised that he posted two additional Stop Work Orders on the telephone pole...*
>
> ***Exhibit D - Photograph of Stop Work Order posted on the garage at 19 Lower Salem Road on July 15, 2004.***
>
> ***Exhibit E & F - 2 Additional Photographs photographed by Mr. Fain on July 20, 2004 depicting the trees and brush cut on the site.***
>
> *Mr. Fain stated that the July 22, 2003 Planning Board Resolution stated that the construction debris shall be removed.. He submitted a photograph taken July 20, 2004 depicting material stockpiled on property the subject of*

many complaints.

There is no dispute that Mr. Fain searched Ms. Gennimi's property and took pictures used to convict her of wetland violations. Furthermore Mr. Fain testified that he searched Ms. Gennimi's house in 2005, as follows:

> *Mr. Fain advised that **he had inspected the house** and advised that when the homeowner had excavated in the rear side yard the soil pipe for the septic system became vulnerable...**He distributed photographs he had taken of the affected area** on April 25, 2005 advising that it was his opinion that as shown in the photographs that there was effluent on the ground...Mr .Fain advised that he would like to get the code enforcement officer, the NYC DEP, NYS DEC and Westchester County Department of Health involved in this matter.*

Planning Board Minutes of April 26, 2005 hearing (emphasis added). Since Mr. Fain was illegally hired as Wetland Inspector in violation of State Law , Mr. Fain did not have the statutory authority to perform searches, take pictures, issue Stop Work orders, initiate prosecution by issuing summonses and Notices of Violations, or to testify at the hearings against Ms. Gennimi. The pictures were illegally obtained by an ineligible Wetland Inspector and as such "did not satisfy the requirements of the Fourth Amendment as made applicable to the States by the Fourteenth". Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971); Suss v. ASPCA, 823 F.Supp. 181, 189 (S.D.N.Y. 1993)(A warrantless search directed by a non-neutral

private party is an event with many strikes against it whether analyzed under the *due process* clause alone, or under that clause as a trigger for Fourth Amendment considerations).

In footnote 1 at page 7, the Second Circuit stated that it declined to consider arguments involving the defendants' violation of Town Law § 23 because the town's wetlands inspector was not a resident of Lewisboro, as follows:

> *We decline to consider these state law arguments raised for the first time on appeal*

The Second Circuit's finding is incorrect in view of the fact that the issue has been raised at least **four** times, first on May 2, 2006 in the pleadings.

On May 2, 2006, the issue of Mr. Fain's illegal employment as Wetlands Inspector in violation of Town Law § 23 was raised in plaintiffs' Third Amended Complaint, Paragraph 12, which defendant stipulated to its filing and which Magistrate Judge Yanthis approved, and which states as follows:

> 12. On January 1, 2003[1] (sic) the town promoted Jay Fain to the position of wetland inspector, in violation of Town Law § 23 which mandates that the wetland inspector be a town resident, whereas Fain resides in Connecticut. On February 25, 2004 the Town amended its Wetland and Watercourse Law to increase the

[1] The actual date is August 1, 2002, based on an employment contract between Mr. Fain and the town supervisor.

> buffer distance from 100 feet to 150 feet and to increase the authorized fines per violation from $5,000 to $7,500 per day. Furthermore, the town amended the definition of "wetland" removed the term "and that under normal circumstances do support" from the CWA definition of wetland, making all dry lands that could possibly, but not actually, support certain wetland vegetation subject to town jurisdiction...

Third Amended Complaint. The Third Amended Complaint was approved and filed by the court on May 2, 2006. On September 28, 2007, plaintiffs filed their opposition brief to Fain's motion for summary judgment stating as follows:

> *I- **FAIN BECAME WETLAND INSPECTOR BEGINNING AUGUST 1, 2002***
>
> *From 1986 to July 31, 2002 Fain worked as a consultant for the town Planning Board and the town wetland inspector, who was then also the town building inspector. [cite]. The plaintiffs' action concerns Fain's position as the town's wetland inspector subsequent to August 1, 2002. On August 1, 2002, at the urging of chairwoman Jackie Dzaluk and other Planning Board members, town Supervisor Thomas Herzog appointed Fain as the town wetland inspector, although such appointment violated Town Law § 23, which mandated that the wetland inspector must be a resident of the town appointing him. The contract also states that beginning August 1, 2002, Fain would work as "an independent contractor" with duties of investigating complaints of wetland violations,*

> *issuing notices of violations and providing testimony before the Planning Board. Herzog recalled that although he signed the contract, it was the Planning Board who actually hired Fain, as "Fain was their boy, they want to continue working with Jay" (Herzog:79) and did not consider anyone else. Id., even though the Board was aware that Fain resided in Connecticut and therefore under State law was not eligible to be appointed as wetland inspector.*

Furthermore, on February 8, 2007, Ms. Gennimi filed a request for Judicial Notice of the Town's admission that it was in violation of Town Law § 23 "for years". Given Ms. Gennimi's repeated arguments that the town's appointment of Mr. Fain as wetlands inspector implicated Town Law § 23, the arguments were not raised for the first time at the Second Circuit level and should have been addressed by the court.

B. Certiorari is warranted because the decision below converting the "special needs" into a "serious needs" conflicts with this Court's decision and the decisions of other circuits

In this case, the courts below condoned the warrantless administrative search of the curtilage of a private residence in reliance upon the special needs exception articulated in Palmieri v. Lynch, 392 F.3d 73 (2d Cir. 2004), in contravention of the decisions of every other Circuit Court of Appeals in this nation and, as well, the decisions of this Court. The courts below lowered the "special needs" bar to the "serious needs" requirement, impermissibly extending the special

needs exception to any neighbors' complaints alleging wetlands violations.

Before the special needs exception can be invoked, a need beyond the normal need for law enforcement must make the warrant and probable-cause requirement impracticable because the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct (citation omitted) and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create (citation omitted) (Griffin v. Wisconsin, 483 U.S. 868, 873-74, 107 S. Ct. 3164 (1987).). Therefore, under Griffin, absent some urgency to perform a search without a warrant and a concomitant need to deter criminal activity, there can exist no special need beyond the normal need for law enforcement, particularly where, as here, Mr. Fain conducted ongoing, numerous administrative searches of the property of an ordinary resident not accused of any crime but only because the neighbors called and complained of wetland violations in connection with her husband's construction of a fence.

The courts below ruled that the town only needed to have a serious need (rather than a "special need") that outweighed the petitioner's expectation of privacy. However, application of this exception requires a threshold analysis whether there exists any serious need, and it cannot be assumed that every governmental regulation gives birth to a serious need . Even if the town had a legitimate serious need beyond the normal need for law enforcement to make the warrant and probable-cause requirement impracticable, the inquiry does not end there since even where a court

concludes that a statute or program qualifies as a "special need," beyond the normal need for law enforcement, the reasonableness of the intrusion must still be evaluated through a balancing analysis. "The search as actually conducted [must be] reasonably related in scope to the circumstances which justified the interference in the first place." New Jersey v. T.L.O., 469 U.S. 325, 341, 105 S.Ct. 733 (1985).

The Nature and Immediacy of the Government's Interest:

The nature of the government's interest does not warrant application of the serious needs exception and the courts below did not recite a single legitimate governmental interest that would have been compromised had the warrantless administrative searches of the petitioner's property not taken place. Although the courts below perceived an interest on the part of respondent to perform a regulatory inspection in order to protect the wetlands, no reason is given why such interest is, in any way, compromised unless petitioner's Fourth Amendment protections are compromised. No cogent reason has been presented why observing the warrant and probable-cause requirement would have been impracticable, especially since the case involved the construction of a fence that took place over a period of several years, from 2004 to 2006. No reason has been suggested as to how continuously violating petitioner's Fourth Amendment rights in any way protects the wetlands, especially since the wetlands inspector Jay Fain admitted that he did not know where the wetlands boundaries were and that the house should be used as a benchmark.

The courts below did not indicate that there existed an immediate need to inspect petitioner's property, especially since Mr. Fain resided out of town and only searched the Gennimi property *a day or more* after the neighbors lodged the original complaints. It would logically follow that no governmental interest would be at stake requiring any court to condone respondents' repeated violation of petitioner's Fourth Amendment protections; and there existed no reason for Mr. Fain to forego the warrant requirement of the Fourth Amendment. Safford Unified School District v. Redding, 129 S. Ct. 2633 (2009); Board of Education v. Earls, 536 U.S. 822, 836, 122 S. Ct. 2559 (2002); ; Griffin v. Wisconsin, supra. at 483 U.S. 876.

Nature of the Privacy Interest Upon Which the Search Intrudes:

Unquestionably, the curtilage of petitioner's home was entitled to the most stringent Fourth Amendment protection. The courts below minimized the intrusion that occurred by characterizing it as "minimally invasive insofar as they were of wetlands or abutting areas, not of plaintiffs' homes" and thus that Gennimi had a diminished expectation of privacy. This conclusion misstated facts that are critical to an appropriate analysis of petitioner's Fourth Amendment protections. Mr. Fain repeatedly testified at hearings that he "had inspected the house" and its immediate surroundings. Such surroundings constitute the "curtilage" of the home and should be afforded the same "Fourth Amendment protections that attach to the home". Palmieri, 392 F.3d at 94 (quoting United States v. Dunn, 480 U.S. 294, 301, 107 S.Ct. 1134 (1987); *see also* Oliver v. United States, 466 U.S. 170, 180, 104 S.Ct.

1735 (1984). Mr. Fain's repeated inspection of the house and its curtilage over a period of four years (2002-2006) in response to neighbors' complaints raised serious Fourth Amendment concerns that cannot be characterized as *de minimus*. Camara v. Municipal Court of San Francisco, 387 U.S. 523, 530-31, 87 S. Ct. 1727 (1967) (even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority).

The Second Circuit's decision trivializing the repeated searches of Ms. Gennimi's property conflicts with other circuits' precedents and the decisions of this Court. The courts below held that petitioner had a diminished expectation of privacy in the curtilage around her home which is abutting "wetlands". This conclusion fails not only because petitioner is the owner of the dwelling and the purported wetlands, but also because it fails to afford sufficient weight to the fact that Mr. Fain physically entered upon petitioner's property and did not merely conduct a visual inspection from a public road, a public waterway, public airspace, or some other location where he ha[d] a right to be. California v. Ciraolo, 476 U.S. 207, 213, 106 S. Ct. 1809 (1986). Rather he conducted his warrantless administrative search on petitioner's property where he had no right to be, and looked into the house through windows.

Private areas of a home or curtilage visible to members of the public are not protected from inspection by governmental agents provided that they do not enter upon the property and that they view such private areas from a permissible vantage point such as

a public road or waterway. California v. Ciraolo, 476 U.S. 207 (1986); Dow Chemical Co. v. United States, 476 U.S. 227, 106 S. Ct. 1819 (1986).

Thus, if a person's living room can be seen from the street by passers-by through a glass window, that fact alone cannot permit entry into the home by governmental agents because physical entry upon the property is much more intrusive than a mere visual inspection from the periphery (Dow Chemical Co. v. United States, *supra.* at 237 (finding that aerial inspection of area in question was permissible but stating that "[a]ny actual physical entry by [the] EPA into any enclosed area would raise significantly different questions"); United States v. Hatfield, 333 F.3d 1189, 1198 (10th Cir. 2003);(explaining that if the officer had "physically invaded the curtilage to make his observation, that would have constituted a search subject to the proscriptions of the Fourth Amendment"); United States v. Jenkins, 124 F.3d 768, 774 (6th Cir. 1997)("Visual inspection from a lawful vantage point, however, is quite different from the physical assault on defendants' backyard that occurred in this case"); Florida v. Riley, 488 U.S. 445, 449, 109 S. Ct. 693 (1989) ("[T]he home and its curtilage are not necessarily protected from inspection that involves no physical invasion As a general proposition, the police may see what may be seen from a public vantage point where [they have] a right to be'"); California v. Ciraolo, *supra.* at 476 U.S. 213:

> ("'The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor

> does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be...").

In this case, Mr. Fain did not view petitioner's backyard from a public road but rather entered upon petitioner's property in order to view her backyard. The overly dismissive view by the courts below that the physical intrusion that occurred in this case was justified because of the "government's interests in protecting natural resources" trivializes the importance of the Fourth Amendment protections at stake and illustrates the perils of defining "wetlands" as any area that could possibly grow wetland vegetation. The fact that the warrantless administrative inspection at issue in this case involved a potential wetland does nothing to excuse the constitutional violation, as determined by the courts below, but rather exacerbates it, since it was based on the vague definition of "wetland" discussed above. See Camara, *supra*, at 387 U.S. at 531 ("the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security"). Moreover, application of the "plain view" doctrine to the facts of this case is impermissible absent an allegation that petitioner was involved in criminal activity.

The decision relied upon for the exceptionally attenuated rationalization that the government's intrusion did not rise to a constitutional level in part because it was *de minimis* ignored the fact that Mr. Fain repeatedly searched the Gennimi's property for four years every time Mr. Fain received a complaint from the neighbors. Such systematic searches could not

possibly be "de minimis," especially when Mr. Fain took pictures to be used in convicting Gennimi of wetlands violations.

The fence was installed to prevent Mr. Fain's searches

The Second Circuit affirmed the Report's finding that "there is no indication in the record that any of the plaintiffs went to the lengths of the plaintiff in Palmieri (stockade fences and "keep out" signs) in preventing a visual inspection of his property." As discussed above, the lower courts failed to give full faith and credit to the State Supreme Court's ruling that Ms. Gennimi was fined $25,000 for installing a fence surrounding her property. The sole reason for installing such fence was to keep Mr. Fain and other town officials from searching her property. Mr. Fain's repeated searches were not, as the Second Circuit affirmed, mere state "trespass." The decisions of the courts below also represent a significant and unjustified departure from the New York Court of Appeals case of Sokolov v. Village of Freeport, 52 N.Y.2d 341, 438 N.Y.S.2d 257 (1981), which held that a local government's intrusion upon a citizen's property under color of law in order to perform an illegal inspection as a condition precedent to its issuance of a permit is impermissible.

The Second Circuit decision constitutes such a radical departure from Supreme Court precedent, state law and other Circuits' case law, and in effect forces homeowners like Gennimi to shutter their windows and completely enclose their backyards with fences, or surrender the privacy they enjoy in their homes and curtilage. That Gennimi did install such a fence all

around her house and backyard and was fined for wetland violations related to the fence installation illustrate the implications of the Town's vague Wetlands law defining "wetland" as any soil that "may" harbor wetland vegetation. In view of the manifest error of the Second Circuit's Fourth Amendment analysis with respect to Gennimi's property, and the conflicts between the Circuits involving the proper scope of searches of houses and their immediate surroundings, this Court may wish to consider summary reversal.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari. The Court may also wish to consider summary reversal.

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(any footnotes trail end of each document)

No. 08-1543-cv
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETER C. MANBECK, DOES 1-1000, JOHN ANONYMOUS, BRUCE CASCIO, EFRAIN CUBIDES, CAROL DURANTE, JAY DURANTE, WENDY GENNIMI, DAVID GUTTERMUTH, LYNN GUTTERMUTH, JERILYNN HAGAN, MICHAEL HONIG, ROGER MOISTER JR., Trustee, MARK MOSELLO, MARY CLARK, individually and on behalf of all others similarly situated, DANIEL PRITCHARD, individually and on behalf of all others similarly situated and GEORGE SHAW, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

SIRO CORTINA, LUIGI IMPERIA and GORAN DJORDJEVSKI, individually and on behalf of all others similarly situated,
Plaintiffs,

MARK CLARK, individually and on behalf of all others similarly situated and DAVID S. OLTMAN, individually and on behalf of all others similarly situated,
Consolidated-Plaintiffs-Appellants,

v.

TOWN OF LEWISBORO, JAMES NORDGREN, Town Supervisor, individually and in his official capacity, PETER BARRETT, Deputy Building Inspector, and other unnamed Building Inspectors, individually and in their official capacity, JAY FAIN,

Wetland Inspector, individually and in his official capacity, Planning Board, JACQUELINE DZALUK, JOSEPH DECAMINADA, Member of the Planning Board, individually and in his official capacity, FREIDA HALPERN, Member of the Planning Board, individually and in her official capacity, MAUREEN MAGUIRE, individually and in her official capacity, P.J. ROSSI, individually and in his official capacity, WILLIAM CARGAIN, CONSERVATION ADVISORY COUNCIL, BUILDING DEPARTMENT, ALLEN HERSHOWITZ, Town Councilman, individually and in his official capacity, JAY FAIN & ASSOCIATES, L.L.C., VINCENT VETRANO, former Chairman of the Planning Board, individually and in his official capacity, Conservation Advisory Council and MARK PATEK, Chairman of the Conservation Advisory Council individually and in his official capacity,
Defendants-Appellees,

WILLIAM AGRESTA, Consolidated-Defendant-Appellee.

May 29, 2009, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeal from the United States District Court for the Southern District of New York (Charles L. Brieant, Judge; George A. Yanthis, Magistrate Judge).

COUNSEL: APPEARING FOR APPELLANTS: NICK FIORE, Pound Ridge, New York

ALEXANDRA T. MANBECK, Cross River, New York.

ROBERT I. GOODMAN, Rye Brook, New York.

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DANIEL E. O'NEILL, Boeggeman, George & Corde, P.C., White Plains, New York.

PRESENT: HONORABLE JOSEPH M. McLAUGHLIN, HONORABLE REENA RAGGI, Circuit Judges, HONORABLE JANE A. RESTANI, Judge. *

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the district court's March 25, 2008 judgment is AFFIRMED.

Plaintiffs appeal from the district court's March 25, 2008 judgment, which adopts the magistrate judge's March 4, 2008 recommendation that summary judgment be granted in favor of defendants on plaintiffs' claims under 42 U.S.C. § 1983; the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968; the Hobbs Act, 18 U.S.C. § 1951(a); and numerous New York state laws. The claims arise from defendants' enforcement of certain local laws concerning the protection of wetlands. *See* Lewisboro, N.Y., Wetlands

and Watercourses Law, L.L. No. 1 (2004); Lewisboro, N.Y., Wetlands and Watercourses Law, L.L. No. 3 (1995). The three groups of plaintiffs raise numerous claims of error in more than 330 pages of opening briefs, none of which has any merit, and many of which raise only issues of state law not cognizable under § 1983. *See Sybalski v. Indep. Group Home Living Program, Inc.*, 546 F.3d 255, 257 (2d Cir. 2008) (noting that under § 1983 plaintiff must show deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States). We assume the parties' familiarity with the facts and procedural history, which we reference only as necessary to explain our decision.

"We review a district court's grant of summary judgment *de novo*, construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in that party's favor." *Mathirampuzha v. Potter*, 548 F.3d 70, 74 (2d Cir. 2008) (alterations omitted) (quoting *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 113 (2d Cir. 2005)). We will affirm a grant of summary judgment only where the record presents "no genuine issue as to any material fact." Fed. R. Civ. P. 56(c).

As to at least one issue, the district court appears to have applied a "clearly erroneous" standard of review, rather than *de novo* review as required by 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). *See Manbeck v. Town of Lewisboro*, No. 05-4576, 2008 U.S. Dist. LEXIS 109120, *4 (S.D.N.Y. Mar. 24, 2008). Nevertheless, this error was harmless because there was no material factual dispute such that the difference in the standard of review would affect the outcome. *See* Fed. R. Civ. P. 61.

Turning to the merits of plaintiffs' claims, we have little difficulty concluding that summary judgment was correctly entered in favor of defendants on the core complaint that plaintiffs were deprived of due process. The "pre-deprivation" hearing afforded defendants prior to imposition of the challenged fines by the Planning Board, coupled with the availability of a "post-deprivation" Article 78 proceeding to challenge any allegedly illegal action by the Planning Board satisfies the requirements of the Due Process Clause. *See Rivera-Powell v. New York City Bd. of Elections*, 470 F.3d 458, 466-67 (2d Cir. 2006) (collecting cases and noting that "at least some form of pre-deprivation hearing" together with adequate post-deprivation hearing satisfied Due Process Clause). Accordingly, we reject each of plaintiffs' due process arguments, including those faulting (1) the town for contracting with a private corporation to do wetlands inspections and with an attorney advisor; (2) the Planning Board for "prejudg[ing]" plaintiffs' claims, because the Board has a pecuniary interest in finding violations; and (3) the Planning Board for relying on the findings of its inspector.[1]

Summary judgment was also properly entered in favor of defendants on Plaintiffs' Fourth Amendment claims because, as in *Palmieri v. Lynch*, (1) the plaintiffs had significantly diminished expectations of privacy because they had applied for construction permits, *see* 392 F.3d 73, 83 (2004), or (2) the challenged inspections were "minimally invasive" insofar as they were of wetlands or abutting areas, not of plaintiffs' homes, *see id.* at 84, or both; and (3) the government has a "serious" interest in protecting natural resources, *see id.* at 84-85.

Plaintiffs' selective prosecution and "class of one" claims under the Equal Protection Clause fare no better. The selective prosecution claim fails as a matter of law because plaintiffs' have not demonstrated that defendants possessed "malicious or bad faith intent" to injure them. *Cobb v. Pozzi*, 363 F.3d 89, 110 (2d Cir. 2004). Plaintiffs' class of one claim fails because defendants' pursuit of violations of the wetlands law was rationally related to the legitimate goals of the town wetlands department. *See Bizzarro v. Miranda*, 394 F.3d 82, 88-89 (2d Cir. 2005) ("[A]n *Olech-type* [class of one] equal protection claim focuses on whether the official's conduct was rationally related to the accomplishment of the work of their agency.").[2]

For the reasons stated in the magistrate judge's report, adopted in full by the district court, we conclude that plaintiffs' following claims also fail as a matter of law: (1) the wetlands laws are unconstitutionally vague as applied to plaintiffs; (2) the process by which the Gutermuths and Shaw acknowledged having violated the relevant law raises constitutional issues; (3) the civil fines imposed by defendants violate the Eighth Amendment; (4) Gennimi was deprived of substantive due process rights when defendants denied her request for a building permit.

Finally, to the extent plaintiffs challenge the district court's decision not to assert supplemental jurisdiction over plaintiffs' state law claims, we conclude that the district court did not abuse its discretion in so ruling.[1] *See Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 305 (2d Cir. 2003) ("[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction

doctrine . . .will point toward declining to exercise jurisdiction over the remaining state-law claims.").

We have considered all of the plaintiffs' remaining arguments and conclude that they are uniformly lacking in merit. Accordingly the district court's award of summary judgment in favor of defendants is AFFIRMED.

Footnotes

*The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

1Plaintiffs also argue that defendants violated one or more plaintiffs' due process rights by (1) failing to maintain hearing records; (2) failing to issue Peter Manbeck a certificate of occupancy for construction of, *inter alia*, a tennis court; (3) finding Wendy Gennimi "guilty of charges not listed in the summons"; and (4) not according Gennimi "voir dire" when she admitted to the violation before the board, thereby rendering her admission constitutionally suspect because it was not knowingly, voluntarily and intelligently made. Although it appears that we need not consider these claims because plaintiffs failed to raise them before the district court, *see In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008), we note that our resolution of those due process claims plaintiffs did raise would, in any event, require us to reject these claims.

2Gennimi suggests in her brief to this court that defendants pursued her for wetlands violations in an

attempt to drive her out of town because of her race. Gennimi did not plead this allegation in her complaint and raised it for the first time in opposition to defendants' motion for summary judgment. Whether it was properly raised before the district court or not, we have no trouble rejecting Gennimi's claim of racial discrimination as conclusory and without any admissible evidentiary support in the record. *See Rivera-Powell v. New York City Bd. of Elections*, 470 F.3d 458, 470 (2d Cir. 2006).

1Plaintiffs also argue that (1) defendants violated Town Law § 23 because the town's wetlands inspector was not a resident of Lewisboro; and (2) the town's denial of Gennimi's request for a building permit was arbitrary and capricious. We decline to consider these state-law arguments raised for the first time on appeal. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d at 133.

05 Civ. 4576 (CLB) (GAY)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETER MANBECK, et al.,
Plaintiffs,

- against -

TOWN OF LEWISBORO, et al.,
Defendants.

2008 U.S. Dist. LEXIS 109120

March 24, 2008, Decided

Memorandum and Order

Brieant, J.

Before this Court for consideration is the Report and Recommendation of the Hon. George A. Yanthis, United States Magistrate Judge, filed March 4, 2008 and Objections to the Report and Recommendation filed by Plaintiffs, received by this Court on March 20, 2008. Familiarity therewith on the part of the reader is assumed

The Report of the Magistrate Judge recommends the granting of a long pending Summary Judgment motion. The Magistrate Judge concluded, essentially as a matter of law, that the motion should be granted and all

claims against Defendants in this long pending litigation should be dismissed.

The Objections raise essentially a dispute over issues of law, and lend themselves more readily to a direct appeal to the Second Circuit rather than reargument of the issues visited by the Magistrate Judge. The first point raised concerns the alleged failure of the Magistrate Judge to give preclusive effect to the *Ridgeway* case, Index No. 94-8987, decided by the Westchester County Supreme Court on Federal Constitutional grounds, as well as the opinion of the New York Attorney General concerning the issues resolved in *Ridgeway*. The latter is mentioned in the Report of the Magistrate Judge. The *Ridgeway* case is only part of an extensive Federal and State jurisprudence relevant to the Constitutional claims in this litigation, and does not present a basis for rejecting the Report and Recommendation.

Further, the Objections tend to blur the distinction between the charges of wetland violations, and the evidence or arguments at the Town hearings. The mixed conclusion of law and fact by the Magistrate Judge, that adequate notice was given is not clearly erroneous.

Insofar as concerns the State causes of action raised by Plaintiffs, it is the ordinary practice to defer to the State Courts where the only basis for subject matter jurisdiction is our supplemental jurisdiction over State claims having the same nucleus of fact as valid Federal claims and if the Federal claims are dismissed out of the case, it is better practice to dismiss the State claims without prejudice and allow them to be adjudicated in the State Courts.

The other points raised have been considered by the Court and do not lead to a rejection or modification of the Report and Recommendation. The Report and Recommendation is adopted as the decision of the District Court. The Objections are disapproved. The Clerk shall file a final judgment and terminate all motions pending as of March 24, 2008 as moot and close the case.

SO ORDERED.

Dated: White Plains, New York

March 24, 2008

/s/ Charles L. Brieant

Charles L. Brieant, U.S.D.J.

05 Civ. 4576 (CLB)(GAY)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETER MANBECK, et al,
Plaintiffs,

-against-

TOWN OF LEWISBORO, et al, Defendants.

March 4, 2008, Decided

GEORGE A. YANTHIS, United States Magistrate Judge. HONORABLE CHARLES L. BRIEANT, United States District Judge.

REPORT AND RECOMMENDATION

TO THE HONORABLE CHARLES L. BRIEANT, United States District Judge:

Plaintiffs commenced this action pursuant to 42 U.S.C. § 1983 and related New York state laws. Plaintiffs claim that: (1) the Town's wetlands law is unconstitutionally vague and violates the void-for-vagueness doctrine, (2) the Town's wetlands law is unconstitutionally vague as applied to the individual plaintiffs, (3) the penalties provided for in the violations sections of the wetlands law is prohibited by the Excessive Fines Clause of the Eighth Amendment, (4) the planning board's jurisdiction over wetlands violations violates the Equal Protection Clause, (5) the wetlands law does not permit those charged with violations to be represented by counsel in violation of

the Sixth Amendment, (6) the wetlands law does not afford those charged with violations due process, and (7) the wetlands law provide for searches in violation of the Fourth Amendment.

On June 8, 2005 a first amended complaint was filed. After the court ordered that a second amended complaint be stricken, plaintiffs' counsel filed a second related action, with four additional plaintiffs. That case was consolidated with the first.

Presently before this Court are the parties' motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). For the reasons set forth below, I respectfully recommend that the plaintiffs' motions be DENIED and the defendants' motions be GRANTED.

I. PLAINTIFF'S FACTUAL ALLEGATIONS

The following facts–taken in the light most favorable to plaintiff–are gleaned from the parties' statements pursuant to Local Civil Rule 56.1 of the United States District Courts for the Southern and Eastern Districts of New York, from the pleadings and from affidavits and affirmations:

A. Jay and Carol Durante

On March 23, 2005 Jay Fain ("Fain"), responding to a complaint, inspected the Durante property on Autumn Ridge road. After the inspection he determined that the Durantes had cut down trees in a wetlands buffer area and deposited the resulting wood chips in a wetlands buffer area without a wetlands permit in violation of the town wetlands law. Fain issued a stop work order. Fain also issued a notice of wetland

activity violation and a planning board summons which were served on the plaintiffs. The summons included a notice that they had a right to be represented by an attorney at the scheduled hearing. By letter from the planning board secretary, plaintiffs were advised that they could be represented by counsel at the scheduled hearing, present evidence on their own behalf and cross examine witnesses. Carol Durante appeared at the hearing without her husband and without counsel. Fain and Carol Durante testified at the hearing. After deliberation, the planning board adopted a resolution finding that there was no violation regarding the tree cutting but found a violation with regard to the depositing of wood chips in a protected wetlands buffer. Plaintiffs were assessed a civil penalty of $ 500.00 and directed to prepare and implement a restoration plan. Plaintiffs received the resolution, have never paid the civil penalty, and never sought judicial review of the decision of the planning board.

B. Lynn and David Gutermuth

In 2002 the plaintiffs submitted an application to build a pool on their property on Todd Hill Circle. As part of the application process, Fain inspected the site and observed that plaintiffs had already cleared and stacked some brush on their property. As a result, on January 3, 2003 Fain issued a notice of wetland activity violation. By summons issued January 31, 2003 plaintiffs were directed to appear before the planning board. The summons included a notice that they had a right to be represented by an attorney at the scheduled hearing. By letter from the planning board secretary, plaintiffs were advised that they could be represented by counsel at the scheduled hearing,

present evidence on their own behalf and cross examine witnesses. On April 22, 2003 David Gutermuth appeared at the public hearing with counsel. At the hearing, plaintiffs admitted, through counsel, that work was done in a regulated and deed restricted area without permit and offered information in mitigation. As a result the planning board imposed a $ 250.00 civil penalty and directed that a restoration plan be submitted and implemented. Plaintiffs have never sought judicial review or reconsideration of the planning board's determination.

C. Geoffrey Shaw

In 2000 the town's Zoning Board of Appeals granted Mr. Shaw a special permit allowing the temporary storage of contractor's equipment on his property. The permit was to be renewed every two years; and was in 2002 and in 2004. Prior to the renewal in 2004, neighbors of Mr. Shaw complained to the building department that he was storing equipment and materials not permitted under the special permit. Based upon the complaints, Mr. Barrett, the building inspector, inspected the property in connection with the special permit. The building department issued an order to remedy violation. Mr. Shaw admitted that he was storing rock, wood chips, and culvert pipe on his property.

After further complaints, Fain issued a notice of wetland activity violation alleging that plaintiff was dumping, grading, excavating and storing construction equipment in a wetland or wetland buffer area. The summons included a notice that they had a right to be represented by an attorney at the scheduled hearing. By letter from the planning board secretary, plaintiffs

were advised that they could be represented by counsel at the scheduled hearing, present evidence on their own behalf and cross examine witnesses. Plaintiff then secured a renewal of his special permit from the Town zoning board of appeals, valid for a period of six months.

Plaintiff appeared before the planning board on January 25, 2005 without an attorney. During his appearance Mr. Shaw admitted to the grading allegation. As a result, the planning board imposed a $ 500.00 civil penalty and directed that a restoration plan be submitted and implemented. Plaintiffs have never sought judicial review or reconsideration of the planning board's determination.

D. Peter Manbeck

On February 26, 2004 plaintiff submitted plans to build a swimming pool to the building department. The plans were approved by the building department and stamped with the legend: "pool not to be filled until enclosure is completed." In October of 2004, building inspector Peter Barrett ("Barrett") conducted a routine inspection of the work in progress. During the inspection, Barrett noticed that the Manbecks were filling their pool although the enclosure was not yet in place. Barrett discussed the situation with Mrs. Manbeck and allowed her to temporarily safeguard the pool with orange nylon construction fence until the permanent enclosure was complete.

In February of 2005 Barrett conducted another routine inspection of the ongoing construction. During the inspection, plaintiff's contractors informed him of the existence of a treehouse on the property. As a

result, Barrett issued an order to remedy as the treehouse had been built without the requisite building permit. Barrett also advised Mrs. Manbeck to apply for a building permit.

Fain conducted a routine inspection of the Manbeck property in connection with the application for the building permit for the treehouse. During the inspection Fain determined that the treehouse was built in a wetlands buffer area without a permit. As a result, plaintiff was issued with a summons and notice to answer charges of violating the town wetlands law. The summons included a notice that they had a right to be represented by an attorney at the scheduled hearing.

During an April 28, 2005 inspection of the work in progress, Barrett observed that a fifteen foot section of the temporary fence had been removed. Barrett immediately posted a stop work order, specifying that no work be done on the premises until the missing fence was replaced. On the same day, Fain issued two additional violation notices for building a shed in the wetlands setback without a wetlands permit and for the clearing and grading of half an acre of forest within the wetlands buffer. In connection with the later charge Fain issued another stop work order.

At the hearing on May 10, 2005, Plaintiff told the planning board that he had removed the treehouse. As a result, that charge was withdrawn. It was also confirmed that the summons and notices for the other two violations had been returned to the planning board secretary as unclaimed. During the hearing Ms. Manbeck attempted to serve the planning board members with a federal complaint and the hearing was

adjourned. To date the hearing has not been concluded and the planning board has not issued any determination in the Manbeck matter.

E. Wendy Gennimi

On September 19, 2002 Fain, in response to neighbor complaints, inspected the Gennimi property on Lower Salem road. Fain observed that plaintiff was building a stone wall in a wetlands area without a wetlands permit. Fain issued a stop work order and a summons and notice of wetlands activity violation. The summons included a notice that they had a right to be represented by an attorney at the scheduled hearing. By letter from the planning board secretary, plaintiff was advised that she could be represented by counsel at the scheduled hearing. On November 26, 2002, plaintiff and her husband Mr. Schliman appeared and admitted that they had worked in the regulated area without a permit. They apologized and requested that the stop work order be lifted. The planning board adopted a resolution assessing a $ 1500.00 civil penalty and directed that a restoration plan be submitted and implemented and that plaintiff apply for the required wetlands permit.

Plaintiff failed to pay the civil penalty and failed to submit the required restoration plan. Mr. Schliman appeared in response to another summons which informed him of his right to be represented by counsel. Mr. Schliman admitted that the planning board's conditions had not been implemented. As a result, the planning board adopted a resolution similar to the previous resolution but also requiring that a stone wall be constructed on the property pursuant to a plan

approved by the wetlands inspector. A wetlands permit for the work was issued and then extended.

Fain conducted a routine investigation of the of the property on May 13, 2004 and observed that plaintiff had failed to comply and was performing additional excavation without the required permit. Fain then issued a stop work order.

Plaintiff appeared on July 27, 2004 pursuant to another summons which informed him of his right to be represented by counsel. At this time plaintiff requested an adjournment so that she might obtain counsel. The hearing was adjourned for such purpose.

On October 12, 2004 plaintiff and her husband appeared without counsel. Mr. Schliman admitted to failing to comply with planning board resolutions. Based upon the admissions, the planning board adopted a resolution which found four separate violations and imposed four separate civil penalties totaling $ 25,000. Plaintiff received the resolution, read it and understood it.

Plaintiff filed a *pro se* Article 78 proceeding to challenge the amount of the fine imposed. When directed by the State to appear, plaintiff did not appear. Subsequently, the Article 78 proceeding was dismissed.

In April of 2005 another summons and notice of wetland activity violation was served on plaintiffs for allowing sewage from her house to discharge directly into a protected area. The septic was repaired and the violation was withdrawn.

F. Mary Clark

On February 17, 2000 Ms. Clark was issued a summons and three notices of wetland activity violation for working on two lots with heavy machinery without a wetlands permit. At the public hearing plaintiff was represented by counsel. By resolution dated May 9, 2000, the planning board determined that plaintiff committed the above three violations and imposed civil penalties of $ 12,500 for each lot, totaling $ 25,000.

Ms. Clark challenged the planning board's determination and penalty by way of an Article 78 proceeding. By decision, order, and judgment dated January 9, 2002, the Supreme Court of the State of New York, County of Westchester, overturned the planning board's determination and remanded the matter for further proceedings.

Thereafter Ms. Clark and the Town of Lewisboro entered into a stipulation of settlement resolving all issues related to the wetlands violations. As a condition of the stipulation of settlement, Ms. Clark agreed to withdraw her claims against the town in the action and also agreed to pay a fine in the amount of $ 7,500.

G. Daniel Pritchard

In September of 2002 Mr. Pritchard applied for a wetlands activity permit to construct a pool on his property. Plaintiff subsequently appeared before the planning board with counsel. During the review process, it was discovered that plaintiff's house had been constructed entirely within the wetlands buffer without a permit. As a result, the planning board requested that plaintiff legitimize his house, or bring it into compliance with the town's wetlands law. After

plaintiff agreed to legitimize his house, he withdrew his application for the pool without the planning board ever making a decision on the application. To this date Mr. Pritchard has never been issued a notice of wetlands activity violation. To this date Mr. Pritchard has never challenged any finding of the planning board.

H. David Oltman

In August, 2001 plaintiff met with Will Agresta, the Town's planning and development consultant. The purpose of the meeting was to discuss Oltman's proposal to develop a 113 acre parcel located on Todd Hill Road. At this time Oltman's proposed plan called for a thirty acre parcel for his home, a seventy acre donation of land for open space and subdivision of the remaining acreage into five or six lots. Mr. Agresta opined that the proposal was reasonable but could take from one to two (1-2) years for the applicable boards to approve.

Oltman initially submitted an application to the planning board for a subdivision of two lots. Before the planning board could consider the proposal, he withdrew his application and resubmitted plans to subdivide the parcel into five building lots and incorporate conservation easements over 97.1 acres. In May of 2003, Mr. Oltman prepared a revised subdivision plan that provided for a seventy acre gift to the town as open space. After several revisions, Mr. Oltman entered into discussions with the NYC DEP and by October of 2004 had agreed to sell them a portion of the parcel. Due to this development, Mr. Oltman again withdrew his five lot subdivision

application and submitted a new proposed subdivision application for two lots.

On March 22, 2005, the resolution issuing final subdivision plat approval was adopted by the planning board. On June 7, 2005 Mr. Oltman sold the 103 acre parcel to a private entity, Todd Farm LLC.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FRCP 56(c). Specifically, the party seeking summary judgment has the burden of demonstrating that no genuine issue respecting any material fact exists. See LaFond v. General Physics Servs. Corp., 50 F.3d 165, 171 (2d Cir. 1995). If the moving party meets its burden, the burden shifts to the opposing party to come forward with "specific facts showing that there is a genuine issue for trial." FRCP 56(e). Where a plaintiff fails to establish an essential element of her claim, "there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (internal quotations and citations omitted).

When deciding a summary judgment motion, the court must resolve all ambiguities and draw all factual inferences in favor of the party opposing the motion. See McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir.

1999). The question is whether, in light of the evidence, a rational jury could find in favor of the nonmoving party. See Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1224 (2d Cir. 1994). Summary judgment must be denied, therefore, if the court finds "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

III. CLAIMS THAT THE TOWN WETLANDS LAW IS UNCONSTITUTIONALLY VAGUE

Plaintiffs claim that the definition of wetlands in the Town wetlands law is unconstitutionally vague on its face and as applied. Specifically, plaintiffs contrast the Town wetlands law, which relies on written definitions of wetlands, with the state and federal statutes, which are only applicable to wetlands identified on agency wetland maps.

"The clarity of a statute that does not involve First Amendment freedoms is to be evaluated on an 'as applied' basis.'" Ass'n of Intern. Auto Mfrs., Inc. v. Abrams, 84 F.3d 602, 613-14 (2d Cir. 1996). As the Town of Lewisboro's definition of wetlands does not involve First Amendment rights, this Court should limit itself to an analysis of the statute as applied to each plaintiff.

Of the six plaintiffs who were charged with wetlands law violations, five acknowledged in deposition that they were aware of "wetlands" on their property before the alleged violations occurred. Of these five, the Gutermuth property was also subject to a

wetlands deed restriction in the County land records. The Durantes, the Manbecks, Mary Clark, and Mr. Shaw also admit knowledge of a Town wetlands law. Because these plaintiffs had actual knowledge of wetlands on their property, a challenge that the definition of wetlands contained in the Town wetlands law is unconstitutionally vague as applied to these plaintiffs is without merit. As landowners with actual knowledge of wetlands on their property, these plaintiffs are charged with knowledge of the statutory provisions which affect the control or disposition of their property. Texaco v. Short, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982); see also Drexler v. New Castle, 62 N.Y.2d 413, 465 N.E.2d 836, 477 N.Y.S.2d 116 (1984) (New York Court of Appeals holds that town may regulate wetlands which are not mapped where plaintiff had actual knowledge of wetlands on her property). Among the statutes which affect the control or disposition of their property is the Town wetlands law.

While Wendy Gennimi alone claimed to be ignorant of any "wetlands" on her property before being charged with wetlands law violations, her property borders mapped State DEC wetlands. As such, the identification of the controlling wetlands in this case was not made pursuant to the allegedly vague language in the Town wetlands law. Rather, it was identified by the State and designated as such on the State DEC map. As such, her property was also subject to regulation by the New York State DEC. Clearly, the definition of wetlands found in the Town Wetlands law is neither applicable nor vague as applied to this plaintiff.

For the above reasons, it is respectfully recommended that with respect to this claim, plaintiffs' motion should be DENIED and defendants' motion should be GRANTED.

IV. EIGHTH AMENDMENT EXCESSIVE FINES CLAIM

Plaintiffs principally rely on two Supreme Court cases to argue that civil penalties of the kind at issue here are subject to the Eighth Amendment prohibition against excessive fines. First, plaintiffs rely on Austin v. United States, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), in which the Supreme Court held that, under certain circumstances, civil forfeiture amounted to a monetary punishment subject to the limitations of the Eighth Amendment. As the instant matter does not deal with civil forfeiture, this case is of limited use. Second, plaintiffs rely on United States v. Halper, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), for the proposition that both civil and criminal sanctions can be punitive and therefore subject to the Eighth Amendment. As an initial matter, Halper deals with the subject of criminal and civil sanctions within the context of Double Jeopardy. Regardless, the methodology laid out in Halper has been explicitly abrogated by the Court in Hudson v. United States, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). Hudson, in sharp contrast with Halper, gives considerable deference to the legislative intent and specifically to the legislative characterization of a sanction. In the present case, the wetlands law specifically provides for both criminal penalties and administrative civil penalties. As all of the plaintiffs charged with wetlands violations were done so under

the provision for civil penalties, the Court should at a minimum give considerable weight to the Town's characterization as such.

Outside of these two inapplicable cases, plaintiffs cite no authority for the proposition that administrative penalties of the sort challenged here are subject to the Eighth Amendment. See New York State Federation of Taxi Drivers, Inc. v. City of New York, 270 F. Supp. 2d 340 (E.D.N.Y. 2003).

Assuming, *arguendo*, that the Excessive Fines clause does apply to administrative civil penalties in the same way that it does to criminal penalties, plaintiffs would have to show that the penalties levied were "grossly disproportionate to the gravity of the offense." United States v. Bajakajian, 524 U.S. 321, 333, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). Of the six plaintiffs who were charged with wetlands violations, only five were assessed civil penalties. Of these five, three were assessed penalties of $ 500.00 or less.

Of the remaining plaintiffs, Mary Clark was originally assessed penalties totaling $ 25,000 for six violations, but later entered into a stipulation of settlement and agreed to pay $ 7,500. Wendy Gennimi has been assessed civil penalties totaling $ 25,000 as a result of four separate violations, each violation averaging less than the $ 7,500 penalty allowed by the statute. The total figure of $ 25,000 was only assessed after Ms. Gennimi's repeated failure to remedy her initial infraction and bring her property into compliance with the Town's wetlands law. Under the circumstances, plaintiff has not shown that such penalty is grossly disproportionate to the gravity of the offense.

For the above reasons, it is respectfully recommended that with respect to this claim, plaintiffs' motion should be DENIED and defendants' motion should be GRANTED.

V. EQUAL PROTECTION CLAIMS

Plaintiffs initially claim that the planning board's jurisdiction over administrative wetlands violations implicates the plaintiffs' equal protection rights. As all administrative wetlands charges are heard before the planning board and not in the town court, plaintiffs' equal protection rights are not so implicated.

Plaintiffs next premise an equal protection claim on the assertion that while the Town pursued wetlands violations against six of the plaintiffs, it failed to pursue wetlands violations against the School District, the Town of Lewisboro Highway Department, and Town resident and landowner Adam Rose (collectively the "similarly situated").

As an initial matter, plaintiffs' equal protection claim only implicates defendant Fain as the initiator of the wetlands violation process. Individual defendants on the planning board could hardly have pursued wetlands charges against the alleged similarly situated parties if Fain never initiated the charges. Defendant municipality is also not implicated as the allegation that Fain failed to charge three wetlands violators falls well short of showing the policy or custom required to invoke municipal liability. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). In fact, plaintiffs do not allege that Fain acted under a common motive when he failed to enforce the

wetlands law against the similarly situated, let alone that he was implementing a policy or custom.

Second, plaintiffs' comparison between plaintiffs, the Highway Department and the School District is misplaced. The wetlands law provides that the law can only be enforced against a "person or property owner." As neither the town itself nor the School district is a person or property owner for the purposes of this law, Fain as a wetlands inspector, lacked the jurisdiction to initiate wetlands violations against these entities. Therefore, any comparison between Fain's treatment of these entities and his treatment of plaintiffs is without effect.

With regard to Adam Rose, the remaining similarly situated, plaintiffs advance two related equal protection arguments to state a claim under the Fourteenth Amendment.

A. Selective Prosecution

First, plaintiffs claim a denial of equal protection as a result of having been subjected to a "selective prosecution." Cobb v. Pozzi, 363 F.3d 89, 109 (2d Cir. 2004). To prevail on a claim of selective prosecution, a plaintiff must "show both (1) that [she was] treated differently from other similarly situated individuals, and (2) that such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." Id. Selective enforcement is a "murky corner of equal protection law in which there are surprisingly few cases." LeClair v. Saunders, 627 F.2d 606, 608 (2d Cir. 1980). A successful plaintiff must establish that

the governmental actor was motivated by reasons wholly unrelated to any legitimate state objective, a burden few are able to carry. Bizzarro v. Miranda, 394 F.3d 82, 86 (2d Cir. 2005).

Plaintiffs fail to establish the second prong of the selective prosecution test. Plaintiffs make conclusory allegations of Fain's malicious intent towards them. However, they fail to provide any theory as to why Fain harbored ill feelings with respect to the six plaintiffs charged with wetlands violations. See Zahra v. Town of Southold, 48 F.3d 674, 684 (2d Cir. 1995) (conclusory allegations of malice without evidence of such was insufficient to establish an equal protection clam); Levy v. Alfano, 47 F. Supp. 2d 488, 496 (S.D.N.Y. 1999) (allegations that enforcement officer was friends with complainant was insufficient to establish malice). Neither do plaintiffs claim that they are members of any uniform race, religion, sex, or affiliation. Without such classification or evidence of malicious intent, plaintiffs fail to establish the second prong of the test. See Zahra, 48 F.3d at 684.

Regardless, plaintiffs have no fundamental right to demand enforcement of the laws against their neighbors. See Zahra, 48 F.3d at 684. "Equal protection does not require that all evils of the same genus be eradicated or none at all." Id. Plaintiffs allege that Fain failed to enforce the laws against Rose because of Rose's undue influence within the Town government, rather than because of any characteristic of plaintiffs or their property. Plaintiffs' attempt to describe how they were treated differently focuses exclusively on Fain's alleged treatment of Rose. Without a claim that they were singled out for the enforcement of a law in such a way as to burden a

constitutional right, plaintiffs do not allege a cognizable constitutional deprivation. See, e.g., Panchura v. Ryan, No. Civ.A. 05-1299, 2006 U.S. Dist. LEXIS 13576, 2006 WL 840335, *2 (W.D.Pa Mar. 28, 2006).

B. Class of One Claim

Plaintiffs also advance a "class of one" claim which relies on a "slightly different theory." Bizzarro, 394 F.3d at 86. A "class of one" may bring an equal protection claim "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). Unlike a selective enforcement claim, a "'class of one' claim is not dependent on a [plaintiff's] ability to prove that [she was] disciplined for an impermissible reason." Cobb, 363 F.3d at 110. Rather, this claim "focuses on whether the official's conduct was rationally related to the accomplishment of the work of their agency." Bizzarro, 394 F.3d at 88-89. However, "class of one" does not "empower federal courts to review government actions for correctness." Id. at 88.

With regards to plaintiffs' "class of one" argument, the plaintiffs again fail to claim that they were intentionally treated different from those similarly situated–rather they claim Rose was the person subject to the special treatment. The fact that the plaintiffs number six and can only name one person who was allegedly not prosecuted for his wetlands violations is suggestive of this upside-down dynamic. To the extent that plaintiffs maintain that they were

singled out for adverse treatment because of the malicious intent of Fain, they must prove that Fain had no rational basis for treating them differently. Bizzarro, 394 F.3d at 88-89; Cobb v. Pozzi, 363 F.3d 89, 108-9 (2d Cir. 2004). "If a jury could reasonably find there was no rational basis for the defendants to believe that initiating charges against these plaintiffs could serve the legitimate goals of the [government agency], a claim would lie." Bizzarro, 394 F.3d at 89. Clearly, a wetlands inspector has a rational basis to believe that initiating charges against six wetlands violators serves the legitimate goals of the Town wetlands department. As was previously discussed, all six plaintiffs eventually admitted to violating the wetlands law. As such, a jury could not reasonably believe that there was no rational basis for the charges.

For the above reasons, it is respectfully recommended that with respect to this claim, plaintiffs' motion should be DENIED and defendants' motion should be GRANTED.

VI. SIXTH AMENDMENT RIGHT TO COUNSEL CLAIMS

The wetlands law permits those charged with violations to be represented by counsel. § 217-12 (A)(1)(e). Plaintiffs Guttermuth, Manbeck, Clark, Oltman and Pritchard all appeared with counsel. Although Gennimi, Durante, and Shaw appeared without counsel, they all admit to being notified of their right to be represented by counsel. In addition, the wetlands law permits an alleged violator to present evidence and to examine any witness. § 217-12(A)(1)(c)and (d).

For the above reasons, it is respectfully recommended that with respect to this claim, plaintiffs' motion should be DENIED and defendants' motion should be GRANTED.

V. DUE PROCESS

In the context of an administrative proceeding, due process requires that plaintiffs be afforded notice and an opportunity to be heard. Fuentes v. Shevin, 407 U.S. 67, 82, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). To the extent that plaintiffs' due process rights were violated by an intentional but unauthorized deprivation of due process, the availability of an Article 78 hearing satisfies this requirement. Indeed, plaintiffs cite prominently to two such Article 78 decisions wherein the state courts recognized due process violations by the Lewisboro Planning Board. Plaintiffs advance three claims which allegedly implicate plaintiffs' due process rights.

A. Claim that Circulation of Violation Summary by Fain is a Deprivation of Due Process

Plaintiffs rely on Ridgeway v. Town of Lewisboro Planning Board, 2003 N.Y. Op. Atty. Gen. 1105, 2003 WL 23100817 (N.Y.A.G.), an Article 78 proceeding in Westchester County Supreme Court, for the proposition that circulating an internal violation summary among the planning board members is a violation of their due process rights. The court in Ridgeway makes no such determination. Rather, it found that the planning board may not issue a summons and notice of violation and then charge a landowner with violations not enumerated in the written notice. The court pointed out that such an

error is not cured when the new violations are included on the internal violations summary document and this document is not given to the alleged violator. In the present case, none of the plaintiffs allege that they were charged with violations at the hearing that were not contained in their summons and notice of violation.

B. Claim that the Internal Distribution of the Violation Summary Constitutes "Pre Judging" in Violation of Plaintiffs' Due Process Rights

Plaintiffs cite Clark v. Town of Lewisboro, Index No. 00-8944, an Article 78 proceeding in Westchester County Supreme Court, for the proposition that circulating an internal violations summary constitutes impermissible prejudging in a governmental body charged with keeping an open mind. However, in Clark, planning board members were faulted for giving media interviews in which they made factual statements as to what had or had not happened and opinions prior to a hearing. The internal violations summary only states the facts as determined by the wetlands inspector. There is no indication, as there was in Clark, that this document caused planning board members to pre-judge the matter before the hearing. To the extent that the plaintiffs allege that Fain prejudged the matters, this is no great revelation. If he did not believe a violation had occurred, he would not have initiated the violation process. However, the wetlands inspector is not involved in the issuing of civil penalties. The planning board alone is the administrative body empowered with hearing the evidence from both sides.

Regardless, the planning board never determined the innocence or guilt of the plaintiffs in the instant action.

Plaintiffs Shaw, Gennimi, and Guttermuth all admitted to the allegations and never required a full hearing. Plaintiff Clark had a full hearing, but the findings of the planning board were overturned in the above cited Article 78 hearing. On remand, Clark entered into a settlement in which she agreed to pay a civil penalty. Plaintiff Durante also had a full hearing. However, in the course of the hearing Durante admitted to one of the violations and the planning board found insufficient evidence to pursue a penalty with regards to the second violation. Plaintiffs Oltman and Pritchard were never charges with a wetland violation and so never had such a hearing. As was previously stated, plaintiff Manbeck's hearing has yet to be concluded. Again, the record is devoid of any evidence of prejudging.

C. Claims that Plaintiffs Gennimi, Durante, and Manbeck's Due Process Rights Were Violated by the Issuance of Stop Work Orders

"Plaintiffs have a procedural due process claim if they have been deprived of a right, privilege or immunity, secured by the United States law or the Constitution, without sufficient procedure attending the deprivation." See Cathedral Church of the Intercessor v. Incorporated Village of Malverne, 353 F. Supp. 2d 375, 386-87 (E.D.N.Y. 2005) (quoting Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989)).

First, plaintiffs must show that they had a property interest in the building permits that were affected by the stop work order. Cathedral Church of the Intercessor, 353 F. Supp. 2d at 386-87. The key inquiry under this prong is whether the plaintiffs were entitled to the permit, or put another way, could the

permit have been denied by the town on non-arbitrary grounds. Id. Here, plaintiffs do not allege that they were entitled to the building permits at issue. Rather, it is evident that the permits issued to the relevant plaintiffs were discretionary; contingent on plaintiffs' compliance with applicable Town zoning and wetlands laws. RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911 (2d Cir. 1988). As such, plaintiffs did not have a constitutionally protected property interest in their permits.

Regardless, even if plaintiffs had a property interest in the building permits, the stop work orders here were temporary suspensions which were to be lifted when plaintiffs complied with Town law. See Cathedral Church of the Intercessor, 353 F. Supp. 2d at 386-87. If the stop work orders in question had been "indefinite suspensions" of a property right, procedural due process rights may have been implicated. Tri-County Indus. v. District of Columbia, 104 F.3d 455, 460-62, 322 U.S. App. D.C. 412 (D.C. Cir. 1997). As such, the issuance of the stop work orders in question did not trigger any additional pre-deprivation due process procedures. Cathedral Church of the Intercessor, 353 F. Supp. 2d at 386-87.

For the above reasons, it is respectfully recommended that with respect to this claim, plaintiffs' motion should be DENIED and defendants' motion should be GRANTED.

VI. CLAIMS THAT PLAINTIFF'S [*34] FOURTH AMENDMENT CLAIMS HAVE BEEN VIOLATED

Plaintiffs claim that their Fourth Amendment rights were violated by various town official who entered onto and visually inspected their property.

The Fourth Amendment vests individuals with the right to be free from "unreasonable government intrusions into their legitimate expectations of privacy." United States v. Reyes, 283 F.3d 446, 457 (1997). In determining the reasonableness of a search, the intrusion on an individual's privacy interests is balanced against the search's promotion of legitimate governmental interest. Palmieri v. Lynch, 392 F.3d 73, 81 (2d Cir. 2004). Searches pursuant to a regulatory scheme need not adhere to the usual requirements where special governmental needs are present. Id. at 79-80; see also Shapiro v. City of Glen Cove, No. CV 03-0280, 2005 U.S. Dist. LEXIS 43276, 2005 WL 1076292, *12 (E.D.N.Y. May 05, 2005) ("By applying for and accepting a building permit, plaintiff implicitly accepted City's supervision of the construction site, including its right to inspect the property at any reasonable hour, thus diminishing her expectation of privacy at the site"). When a government official enters upon a citizen's private property but does not seek to inspect the interior of his house, his personal property, his person, or any closed containers, he at worst commits a trespass. Palmieri, 392 F.3d at 84; see also Reed v. Schneider, 612 F. Supp. 216, 221 (E.D.N.Y. 1985) ("Technical trespasses have been found not to constitute unreasonable searches.").

In the instant case, the Town had a legitimate interest in protecting the town's wetlands and by extension it's water supply. Palmieri v. Lynch, 392 F.3d at 84-85. All alleged inspections were either done in response to a complaint or as part of a permit process. In addition,

all inspections were visual inspections of open land, an area where citizens enjoy a diminished expectation of privacy at best. Id. at 81. Indeed, there is no indication in the record that any of the plaintiffs went to the lengths of the plaintiff in Palmieri (stockade fences and "keep out" signs) in preventing a visual inspection of his property. As such instant plaintiffs would have a diminished expectation of privacy in their open property.

Regardless, none of the plaintiffs except Mr. Shaw and the Durantes have alleged that town officials have entered their property without their consent or the consent of their representatives. Even Mr. Shaw reluctantly acknowledged that the complained of search was only conducted in connection with building permits, or because the building inspector was permitted to do so pursuant to the express terms of the special permit issued to Mr. Shaw. In the case of the Durantes, Fain inspected the open property while employees from a tree removal company were on the property removing trees. Given the circumstances and the diminished expectation of privacy, the Durantes' Fourth Amendment rights were not violated in any significant way.

For the above reasons, it is respectfully recommended that with respect to this claim, plaintiffs' motion should be DENIED and defendants' motion should be GRANTED.

VII. CLAIMS OF OLTMAN AND PRITCHARD

Plaintiffs Oltman and Pritchard have failed to claim any cognizable violation of a constitutional right as required under § 1983. The Planning board approved

the only complete subdivision application Mr. Oltman ever filed. To the extent that Mr. Oltman claims he was the victim of a "conspiracy" among town officials, he cannot point to any resulting violation of a constitutional right.

During a planning board review of Mr. Pritchard's lot as part of an application for a variance, it was discovered that the entire house was out of compliance with wetlands laws. Defendants claim that the extent of the wetlands had been fraudulently misrepresented by the builder in order to secure the building permit. When the Town requested that Mr. Pritchard legitimize his house, Pritchard readily agreed and did so. In the process, Mr. Pritchard withdrew his application for the variance that initiated the process. In sum, Mr. Pritchard cannot point to any resolution or adverse action by the town which violated a constitutional right.

For the above reasons, it is respectfully recommended that with respect to these plaintiffs, plaintiffs' motion should be DENIED and defendants' motion should be GRANTED.

VIII. CONSPIRACY

Because plaintiffs have failed to state a claim under 42 U.S.C. § 1983, all § 1983 conspiracy claims must likewise be dismissed. Singer v. Fulton County Sheriff, 63 F.3d 110, 119 (2d Cir. 1995). To the extent that plaintiffs' complaint states a claim for conspiracy under 42 U.S.C § 1985, plaintiffs have failed to demonstrate that the alleged conspiracy was motivated by "some racial, or perhaps otherwise class based invidious

discriminatory animus." Mian v. Donaldson v. Jenrett Securities Corp., 7 F.3d 1085, 1087-88 (2d Cir. 1993).

For the above reasons, it is respectfully recommended that with respect to this claim, plaintiffs' motion should be DENIED and defendants' motion should be GRANTED.

IX. RESIDUAL FEDERAL CLAIMS

A. The Hobbs Act and 18 U.S.C. § 1962

The Court finds insufficient evidence in the record to support a claim that any defendant conspired with any party to extort money in violation of the Hobbs Act or any other federal statute.

B. Claim that Defendants Fain and Clark Were Employed as a Wetlands Inspector in Violation of Federal Law

None of the case law cited by plaintiffs prohibits the Town from contracting with a private corporation to perform administrative or consultative services. Mr. Fain's contract as a wetlands inspector specifies only investigative and consultative duties. The record is void of any showing that he performed judicial or law enforcement duties beyond the scope of the contract. The fact remains that Fain inspected at the direction of the Town, and the planning board made the final determinations with respect to wetlands violations.

Likewise, as attorney for the Building Department and Planning board, Ms. Clark's contract with the town specifies only administrative and advisory duties. The record is void of any showing that she performed prosecutorial or judicial duties beyond the scope of the

contract. While Ms. Clark aided the planning board in the preparation of administrative charges, plaintiffs make no showing that her duties were prosecutorial in nature.

For the above reasons, it is respectfully recommended that with respect to these claims, plaintiffs' motion should be DENIED and defendants' motion should be GRANTED.

X. STATE LAW CLAIMS

As a result of the dismissal of all of Plaintiffs' federal causes of action, this Court should decline to exercise its supplemental jurisdiction over plaintiffs' state causes of action. 28 U.S.C. § 1367(c)(3); Travelers Ins. Co. v. Keeling, 996 F.2d 1485, 1490 (2d Cir. 1993).

XI. CONCLUSION

For all of the foregoing reasons, I conclude, and respectfully recommend that defendants' motions for summary judgment should be granted and all claims against defendants should be dismissed.

XII. NOTICE

Pursuant to 28 U.S.C. § 636(b)(1)(B), as amended, and Rule 72(b), Fed. R. Civ. P., the parties shall have ten (10) days from receipt of this Report to serve and file written objections to this Report and Recommendation. If copies of this Report are served upon the parties by mail, the parties shall have thirteen (13) days from receipt of this Report to file and serve written objections. See Fed. R. Civ. P. 6(e). Such objections, if any, shall be filed with the Clerk of the Court, with extra copies delivered to the chambers

of The Honorable Charles L. Brieant at the United States District Court, Southern District of New York, 300 Quarropas Street, White Plains, New York, 10601, and to the chambers of the undersigned at said Courthouse.

Failure to file timely objections to this Report and Recommendation will preclude later appellate review of any order of judgment that will be entered. See Small v, Secretary of H.H.S., 892 F.2d 15, 16 (2d Cir. 1989).

Requests for extensions of time to file objections must be made to the Honorable Charles L. Brieant and not to the undersigned.

Dated: March 4, 2008

White Plains, New York

Respectfully Submitted,

/s/ George A. Yanthis

GEORGE A. YANTHIS, U.S.M.J.

Filed 8/31/09
No. 08-1543-cv
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETER C. MANBECK, DOES 1-1000, JOHN ANONYMOUS, BRUCE CASCIO, EFRAIN CUBIDES, CAROL DURANTE, JAY DURANTE, WENDY GENNIMI, DAVID GUTTERMUTH, LYNN GUTTERMUTH, JERILYNN HAGAN, MICHAEL HONIG, ROGER MOISTER JR., Trustee, MARK MOSELLO, MARY CLARK, individually and on behalf of all others similarly situated, DANIEL PRITCHARD, individually and on behalf of all others similarly situated and GEORGE SHAW, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

SIRO CORTINA, LUIGI IMPERIA and GORAN DJORDJEVSKI, individually and on behalf of all others similarly situated,
Plaintiffs,

MARK CLARK, individually and on behalf of all others similarly situated and DAVID S. OLTMAN, individually and on behalf of all others similarly situated,
Consolidated-Plaintiffs-Appellants,
v.
TOWN OF LEWISBORO, JAMES NORDGREN, Town Supervisor, individually and in his official capacity, PETER BARRETT, Deputy Building Inspector, and other unnamed Building Inspectors, individually and in their official capacity, JAY FAIN, Wetland Inspector, individually and in his official

capacity, Planning Board, JACQUELINE DZALUK, JOSEPH DECAMINADA, Member of the Planning Board, individually and in his official capacity, FREIDA HALPERN, Member of the Planning Board, individually and in her official capacity, MAUREEN MAGUIRE, individually and in her official capacity, P.J. ROSSI, individually and in his official capacity, WILLIAM CARGAIN, CONSERVATION ADVISORY COUNCIL, BUILDING DEPARTMENT, ALLEN HERSHOWITZ, Town Councilman, individually and in his official capacity, JAY FAIN & ASSOCIATES, L.L.C., VINCENT VETRANO, former Chairman of the Planning Board, individually and in his official capacity, Conservation Advisory Council and MARK PATEK, Chairman of the Conservation Advisory Council individually and in his official capacity,
Defendants-Appellees,

WILLIAM AGRESTA, Consolidated-Defendant-Appellee.

ORDER

Appellants, Peter C. Manbeck, DOES 1-1000, John Anonymous, et al., having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

Filed 8/29/2007
Index No. 2771/07

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF WESTCHESTER

TOWN BOARD OF THE TOWN OF LEWISBORO,
Plaintiff

-against-

WENDY GENNIMI AND VICTOR SCHLIMAN, 19 LOWER SALEM ROAD, SOUTH SALEM, NEW YORK, Defendants

DECISION AND ORDER

LOEHR, J.

The following papers numbered 1 to 5 were read on Defendants' motion pursuant to CPLR 3211 dismissing the complaint or, alternatively, staying the action.

	Papers Numbered
Notice of Motion – Affirmation – Exhibits (Vol. I & II)	1
Affirmation in Opposition	2
Memorandum of Law in Opposition	3
Affirmation in Support	4
Reply Memorandum of Law	5

Upon the foregoing papers, it appears that on July 15,

2004 Defendant Gennimi was charged by the Lewisboro Planning Board (the "Planning Board") with constructing a fence without a permit in violation of the Town of Lewisboro Wetlands Law. After several hearings before the Planning Board, on October 26, 2004, the Planning Board determined that Gennimi had violated the Wetlands Law and imposed fines totaling $52,000. In July 2005, the Defendants joined a federal action (pending before United States District Judge Charles L. Brieant) as party-plaintiffs. In that action, the Defendants herein challenged the constitutionality of the Wetlands Law on its face and as applied to them and sought to enjoin the Town of Lewisboro from enforcing the fines. On July 21, 2005, the Federal Court issued injunctions staying enforcement activity for the balance of the action and by a Memorandum and Order dated November 10, 2005 directed that discovery should proceed on the constitutional claims. The fence in question also apparently violated the Town's setback requirements and on February 2, 2007, Gennimi filed an application with the Lewisboro Zoning Board of Appeals (the "ZBA") seeking a variance with respect thereto. Such administrative proceeding also remains pending. The Town has also issued "stop work" orders with respect to such bands and with respect to Defendant Schliman operating a commercial landscaping business on this residentially zoned property in violation of Town Code Sec. 220-23(A). The enforcement of such stop work orders-to the extent they have not been stayed by the federal action-are pending in the Town of Lewisboro Justice Court.

All of the foregoing notwithstanding, on February 16, 2007, Plaintiff commenced the instant action. The complaint asserts for causes of action: the first three

see declaratory relief as follows. The first cause of action seeks a declaration with respect to the non-conforming nature of the fence. The second with respect to the Defendants engaged in commercial activity on residential property and the third seeks a declaration that the Defendants have violated the Wetlands Law. The fourth cause of action seeks to enjoin the Defendants from continuing such violations.

CPLR 3211(a)(4) authorizes this Court to stay an action where there is another action pending between the same parties for the same relief. Here, in first cause of action (the fence setback) the Plaintiff is seeking relief with respect to the subject matter of a proceeding pending before the ZBA. In the second cause of action (the commercial use of residential property), to the extent it has not been stayed by the federal action, the Plaintiff is seeking relief with respect to the subject matter of a proceeding pending before the Town Justice Court, and in the third cause of action (Wetlands), the Plaintiff is seeking relief with respect to the subject matter of a proceeding pending before the Federal Court. For the foregoing reasons, each of these causes of action is stayed pending the completion of the prior pending action or actions.

The foregoing constitutes the decision in order of this Court.

6/17/2008

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

2007-09523
Town Board of Town of Lewisboro, appellant, v Wendy Gennimi, et al., respondents.
(Index No. 07-2771)

ORDER ON APPLICATION
Application to Withdraw Appeal

Application by the appellant to withdraw an appeal from an order of the Supreme Court, Westchester County, entered August 29, 2007.

Upon the papers filed in support of the application and no papers having been filed in opposition or in relation thereto, it is

ORDERED that the application is granted and the appeal is marked withdrawn.

United States Constitution, Art. IV, § 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may be general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment

No State shall...deprive any person of life, liberty, or property, without due process of law...nor deny to any person within its jurisdiction the equal protection of the laws.

The statutes involved are the Civil Rights Act, +42 U.S.C. §§1983 and 1985(3), the Clean Water Act and the Full Faith and Credit Act.

Title 42, Section 1983 of the United States Code provide, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State... , subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution

and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,.. .

Title 42, Section 1985 of the United States Code provide, in pertinent part:
(3) Depriving persons of rights or privileges.
If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ... or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The Clean Water Act (CWA), 33 U.S.C.A. § 1251 et seq., provides in pertinent part:

Except as in compliance with this section and section[]...1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).
The Secretary may issue permits, after notice and opportunity for public hearings, for the discharge of

dredged or fill materials into the navigable waters at specified disposal sites.

Judiciary and Judicial Procedure, 28 U.S.C. § 1738 provides:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

The Federal Regulations involved are 33 C.F.R. § 328.3

For the purpose of this regulation these terms are defined as follows:

(a) The term waters of the United States means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are

subject to the ebb and flow of the tide;
(2) All interstate waters including interstate wetlands;
(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
(4) All impoundments of waters otherwise defined as waters of the United States under the definition;
(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
(6) The territorial seas;
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section....

(b) The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

The State laws involved are:

New York State Town Law § 23. Eligibility of town

officers

1- Every elective officer of the town at the time of his election and throughout his term of office, shall be an elector of the town. Every other officer of the town at the time of his appointment and throughout his term of office shall be an elector of the town except that: (a) in towns having no resident attorney, the town attorney and such counsel as may be employed need not be electors;

The local laws involved are:

LEWISBORO WETLANDS AND WATERCOURSES LAW
CHAPTER 217 provides in relevant part:

§ 217-2 Definitions; word usage

WETLAND/FRESHWATER WETLAND - All areas that comprise hydric soils and/or
are inundated or saturated by surface or ground water at a frequency and duration
sufficient to support a prevalence of hydrophytic vegetation.

§ 217-11 Enforcement, stop work orders, violations and penalties.

B. Enforcement agents. This chapter shall be enforced by the Wetland Inspector and
such deputy inspectors as may be appointed by the Town Board.

E. Penalties for violations, administrative and criminal

sanctions.

(1) Any single violation shall be subject to either administrative or criminal
sanctions but not both.

(2) Administrative sanctions.

(a) Any person or property owner who undertakes any regulated activity within a **wetland, watercourse and/or buffer area** without a permit issued hereunder; or who violates, disobeys or disregards any provision of this chapter, including any provision of any permit issued pursuant to this chapter, shall be liable to the Town of Lewisboro for a civil penalty of not more than seven thousand five hundred dollars ($7,500.) for every such violation. Any civil penalty in excess of five thousand dollars ($5,000.) shall be based upon a finding of willful violation by a majority of the board plus one.

Supreme Court, U.S.
FILED
MAR 10 2010
OFFICE OF THE CLERK

No. 09-813

In The Supreme Court of the United States

WENDY GENNIMI,

Petitioner,

v.

TOWN OF LEWISBORO, JAY FAIN, JAY FAIN & ASSOCIATES, L.L.C., MARGARET CLARK, JAMES NORDGREN, JACQUELINE DZALUK, JOSEPH DECAMINADA, FREDA HALPERN, MAUREEN MAGUIRE, P.J. ROSSI, AND WILLIAM CARGAIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. O'NEILL, ESQ.
Counsel of Record
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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioner has presented compelling reasons to grant the Petition, where the Second Circuit's *de novo* review resulted in a Summary Order that properly affirmed the District Court's granting of summary judgment in favor of the defendants, and where said Order does not conflict with a decision of this Court, a Court of Appeals, the state court of last resort, and where Petitioners do not claim that the Second Circuit's ruling implicates an important federal question that has not been settled by this Court.

2. Whether Petitioner has presented compelling reasons to grant the Petition, where the lower courts did not accord "full faith and credit" to a state court decision because it was not a "final" decision and did not make any findings of fact.

3. Whether Petitioner has presented compelling reasons to grant the Petition, where the inspections of Petitioner's property were appropriate pursuant to the "special needs doctrine" in that the inspections were "minimally intrusive," Petitioner had significantly reduced expectations of privacy, the Town of Lewisboro had a serious interest in protecting natural resources, and where there is no evidence that inspections were made of the curtilage.

COUNTER STATEMENT OF QUESTIONS PRESENTED – Continued

4. Whether Petitioner has presented compelling reasons to grant the Petition, where Jay Fain and Jay Fain & Associates, L.L.C. were private contractors and, as such, excluded from the reach of Petitioner's 42 U.S.C. § 1983 claims and not subject to state laws about residency.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Jay Fain & Associates, L.L.C., a Connecticut limited liability company, is not a subsidiary or affiliate of a publicly held company. No publicly owned company owns 10% or more of the membership interests of Jay Fain & Associates, L.L.C.

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STATEMENT OF THE CASE

This brief is submitted on behalf of respondents Jay Fain and Jay Fain & Associates, L.L.C. (hereinafter "the Fain respondents") in opposition to the Petition for Writ of Certiorari.

Petitioner[1] has presented no "compelling reasons" for her Petition for a Writ of Certiorari to be granted ("Petition"). *See* Sup. Ct. R. 10. Petitioner has failed to demonstrate that the Second Circuit's Summary Order of May 29, 2009 is in conflict with a relevant decision of this Court, another Court of Appeals, or the New York State court of last resort. Nor has Petitioner demonstrated that the Second Circuit has issued a decision on an important federal question that has not been settled by this Court. There is also no indication that the Second Circuit at all "departed from the accepted and usual course of judicial proceedings." *See* Sup. Ct. R. 10(a), (c).

For these reasons, and others as set forth below, Petitioner's request for a Writ of Certiorari should be denied in its entirety and particularly with respect to the Fain respondents.

The Fain respondents were retained by the Town of Lewisboro as a private contractor in August 2002 to perform duties of a wetlands inspector and wetlands consultant. The duties included that Jay Fain

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[1] Petitioner Gennimi is the only plaintiff who has sought a Writ of Certiorari.

investigate allegations of violations of wetlands laws. With respect to the Petitioner, Jay Fain received complaints from neighbors about activities that allegedly violated wetlands laws. After investigation, Jay Fain issued a summons and notice of wetlands violation. The Town then followed up with a letter to the Petitioner stating that she was entitled to representation by counsel at a hearing before the Planning Board.

Petitioner and her husband admitted to violations and agreed to implement a restoration plan. Jay Fain conducted follow-up inspections and determined that Petitioner failed to comply with the restoration plan. The subsequent course of events is set forth below.

The Statement portion of the Petition contains an implication that Jay Fain and Jay Fain & Associates were Town of Lewisboro employees. (Pet. App. at p. 3.) In fact, the Fain respondents were private consultants. (Pet. App. at p. 39a.)

REASONS WHY THE PETITION MUST BE DENIED

I. THERE WAS NO BASIS TO APPLY "FULL FAITH AND CREDIT" BECAUSE THE STATE COURT DECISION WAS NOT A "FINAL" DECISION AND DID NOT CONTAIN ANY FINDINGS OF FACT

Petitioner's contention that the District Court and Second Circuit disregarded a decision of the New York State Supreme Court is baseless because that decision did not make *any* findings of fact. (Pet. App. at p. 44a-46a.) The decision in *Town of Lewisboro v. Wendy Gennimi and Victor Schliman* was not "final" and there was nothing that could be afforded "full faith and credit." *Barber v. Barber*, 323 U.S. 77, 80-81, 65 S.Ct. 137, 139, 89 L.Ed. 82, 84 (1944). Without a finding of fact, there was nothing that the Second Circuit could have based "preclusive effect" on.

The state court merely stayed the causes of action "pending the completion of the prior pending action or actions" that were before the Town of Lewisboro Zoning Board of Appeals, Town Justice Court, and the U.S. District Court. (Pet. App. at p. 46a.) Despite Petitioner's claims, the state court decision only reviewed the allegations and defenses in the matter before it and in the "prior pending action or actions." No determinations of fact or law were made. (Pet. App. at p. 44a-46a.) The Second Circuit

therefore could not have made a finding of "preclusive effect."[2]

By arguing that the Second Circuit and District Court "failed to accord full faith and credit to the New York State court's findings of fact regarding identical wetlands claims," Petitioner has made misstatements of both law and fact. *See* Sup. Ct. R. 15(2).

In addition, Petitioner did not raise the issue of "full faith and credit" of the state court decision in her appeal to the Second Circuit.

II. THERE IS NO CONFLICT BETWEEN COURTS ABOUT WHAT CONSTITUTES A WETLAND AND, IN ANY EVENT, THIS ISSUE IS NOT RELEVANT TO PETITIONER'S CLAIMS AGAINST THE FAIN RESPONDENTS

Petitioner argues under point heading II that Jay Fain somehow determined which lands in the Town were wetlands. There is no basis for this argument, which ignores that Fain's role was limited to that of an inspector and consultant. (Pet. App. at p. 33a; also *see* p. 31a-32a.) As a private consultant, Jay Fain did not vote on adopting or revising the Town's wetlands laws and did not adjudicate charges, but merely fulfilled his job responsibilities as inspector to

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[2] The Town of Lewisboro withdrew its appeal of the state court's decision. (Pet. App. at p. 47a.)

investigate allegations and as a consultant. (Pet. App. at p. 33a, 27a.)

Petitioner's arguments about what constitutes a wetland were properly analyzed by the Magistrate in his Report that was adopted in full by the Second Circuit. The Report noted that Petitioner's property bordered State designated wetlands. (Pet. App. at p. 23a-24a, 6a.) Also, Petitioner admitted that she had understood the charges, admitted to violations of the Town's wetlands laws and agreed to undertake remediation set by the Planning Board. (Pet. App. at p. 18a-19a, 26a, 31a.) The fact that Petitioner subsequently failed to implement restoration plans, despite her agreements to do so, does not demonstrate a violation of any substantive right.

Also, Petitioner did not appeal any of the Planning Board's resolutions except for one, which was dismissed after she failed to appear. (Pet. App. at p. 19a.) It is apparent that Petitioner was capable of utilizing the appellate, post-deprivation, process. (Pet. App. at p. 5a, 19a.) And in understanding the charges brought, Petitioner was knowledgeable to utilize the pre-deprivation process as well. (Pet. App. at p. 5a, 7a.)

Petitioner makes a misstatement of fact in stating that she was "convicted of wetlands violations for building a fence around her home." (Pet. App. at p. 19a.) Petitioner actually pled guilty to charges and agreed to restoration plans (that she failed to implement). (Pet. App. at p. 18a-19a, 7a.)

III. PETITIONER HAS FAILED TO DEMONSTRATE A CONFLICT BETWEEN THE SECOND CIRCUIT'S SUMMARY ORDER AND A DECISION OF THIS COURT, A COURT OF APPEALS, OR THE NEW YORK STATE COURT OF LAST RESORT

The Second Circuit correctly held that summary judgment was properly granted to the defendants concerning the plaintiffs' Fourth Amendment claims. The Fourth Amendment claims were dismissed "because, as in *Palmieri v. Lynch*: (1) plaintiffs had significantly diminished expectations of privacy because they had applied for construction permits, *see* 392 F.3d 73, 83 (2004); or (2) the challenged inspections were "minimally invasive" insofar as they were wetlands or abutting areas, not of plaintiffs' homes, *see id.* at 84, or both; and (3) the government has a "serious" interest in protecting natural resources, *see id.* at 84-85. (Pet. App. at 5a.); citations to *Palmieri v. Lynch*, 392 F.3d 73, 83-85 (2nd Cir. 2004). In making this determination, the Second Circuit properly found that the "special needs doctrine" was applicable to the inspections of the property owned by the Petitioner and her husband.

A. The Second Circuit's Summary Order is not in conflict with any decision of this Court, another Court of Appeals or the New York State Court of Appeals

Petitioner has failed to demonstrate that the Second Circuit's Order in the instant matter, or in *Palmieri v. Lynch*, are in conflict with any decision of this Court including *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727 (1967). It is telling is that this Court denied certiorari in *Palmieri v. Lynch* at 546 U.S. 937, 126 S.Ct. 424, 163 L.Ed.2d 323 (2005). The Second Circuit's decision and reasoning in *Palmieri* has not been overruled or modified – and the decision is directly applicable to the instant matter.

In *Palmieri*, the Second Circuit cited to *Camara v. Municipal Court of San Francisco, id.*; *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987); *Dow Chemical v. United States*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986); *California v. Ciralo,* 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986), and other decisions of this Court pertaining to warrantless searches under the Fourth Amendment. The Second Circuit found that the "special needs doctrine" should be applied cautiously while being "especially applicable" in cases involving environmental inspections "given its utility in providing a framework to balance important non-arbitrary governmental objectives against de minimis intrusions in

situations in which there is some degree of an expectation of privacy." *Palmieri* at 80.

B. The inspections of petitioner's property were in accordance with the "special needs doctrine" concerning Fourth Amendment searches

The analysis of the "special needs doctrine" set forth in *Palmieri* was appropriately applied in the Second Circuit's decision herein. (*See* Pet. App. at p. 5a; *Palmieri* at 83.) Petitioner has not distinguished the *Palmieri* holding from the facts and applicable law herein.

Instead, Petitioner has misstated certain facts as part of her argument that the Second Circuit's Order is in conflict with *Camara,* other decisions of this Court, and other Courts of Appeals decisions.

Despite claims in the Petition, there is no evidence that Jay Fain searched the curtilage of Petitioner's property, i.e., "the area immediately surrounding a private house"; *Dow* at 235. Petitioner has referred to hearsay from minutes of the Planning Board but not cited proof in proper form including sworn deposition testimony. The Planning Board minutes referenced by Petitioner actually demonstrate that Fain's inspections were "minimally invasive" and were conducted of wetlands and abutting areas, but not of plaintiff's home. The descriptions in the minutes are of outdoor areas that are not curtilage. (*See* Pet. App. at p. 24-26.)

The inspections were conducted only after neighbors' complaints and petitioner's repeated failures to abide by remedies she had agreed to. The circumstances of the inspections demonstrate that: a) petitioner had "significantly diminished expectations of privacy," b) the inspections were minimally invasive, and c) the Town of Lewisboro had a "serious interest" in protecting natural resources by enforcing wetlands laws. (*See* Pet. App. at 5a; *Palmieri* at 83, 86.)

As set forth in the Magistrate's Report and Recommendations, Mr. Fain initially inspected the Petitioner's property in response to numerous complaints by neighbors that Petitioner's husband was operating a landscape business from their home and performing work in violation of the Town's wetlands laws. (*See* Pet. App. at 18a-19a.) After receiving the complaints, on September 19, 2002 Jay Fain observed Petitioner's husband constructing a stone wall on a wetlands area without a wetlands permit. (The Petitioner's property borders a State-designated wetland.) After Mr. Fain spoke with Petitioner's husband, a stop-work-order was issued as was a summons and notice of wetlands violation. There is no evidence the inspection was anything but "minimally invasive" and it did not pertain to Petitioner's house or curtilage. (*See* Pet. App. at 18a.)

Petitioner and her husband were then advised by letter that they were entitled to representation by counsel at a hearing. At the hearing on November 26, 2002 Petitioner and her husband admitted to – and

apologized for – working in a regulated area without a permit. The Planning Board then withdrew the stop-work-order and adopted a resolution that directed that petitioner and her husband submit and implement a restoration plan and pay a civil penalty of $1,500. (*See* Pet. App. at 18a.) Petitioner did not appeal this Planning Board resolution.

When a plan was not submitted and the penalty not paid, on May 13, 2004 Mr. Fain conducted a routine inspection and observed that additional excavation was being performed without a permit. He then issued a "notice of wetland activity violation." On June 10, 2003 petitioner's husband appeared at a Planning Board hearing and admitted to not complying with the resolution. Another resolution was passed by the Planning Board and Mr. Fain issued a Wetlands Permit. (*See* Pet. App. at 19a.)

On May 13, 2004 Mr. Fain conducted a follow-up inspection and observed that Petitioner had still not implemented the restoration plan. Although Mr. Fain issued another stop-work-order, Petitioner and her husband continued to undertake work. As a result, on June 17, 2004 another notice of wetlands violation was issued.

In response to a neighbor's complaint, further inspections were conducted and stop-work-orders were posted by Mr. Fain on July 15, July 20 and July 23, 2004. On July 27, 2004 Petitioner was granted an adjournment of the Planning Board hearing concerning the alleged violations. When petitioner failed to

appear on the adjourned date of September 28, 2004, the Planning Board again adjourned the hearing. On October 12, 2004 Petitioner and her husband finally appeared – and admitted to violations of the wetlands laws and failure to conform with the Planning Board resolutions. The Planning Board then issued four separate fines. (*See* Pet. App. at 19a.)

Petitioner filed an appeal of these fines with the New York State Supreme Court via an Article 78 petition. The Article 78 petition was dismissed after petitioner failed to appear although directed by the court. (*See* Pet. App. at 19a.) Petitioner did not pursue an appeal of any other Planning Board resolutions.

In April 2005 another summons and notice of wetlands violation was issued to the petitioner and her husband, this time because of sewage discharge into a protected area. The violation was withdrawn after petitioner's septic system was repaired.[3] (*See* Pet. App. at 19a.)

The reasons for the initial and subsequent inspections, and the manner in which the inspections were conducted, were fully in compliance with the "special needs doctrine" pertaining to Fourth

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[3] The excerpt from the minutes of April 26, 2005 pertains to the discharge of sewage into protected areas. (*See* Pet. App. at p. 25.) By this time, Mr. Fain had inspected petitioner's property a number of times because of Petitioner's repeated failure to abide by agreed-upon remedies and because of complaints.

Amendment searches. The inspections were of wetlands areas, not curtilage, and were "minimally invasive."

Petitioner makes misstatements of both law and fact in the discussion concerning installation of a fence on her property and its effect on the Second Circuit's reliance on *Palmieri*. Petitioner incorrectly states that the state court issued a "ruling that Ms. Gennimi was fined $25,000 for installing a fence surrounding her property. The sole reason for installing such fence was to keep Mr. Fain and other town officials from searching her property." (Pet. App. at p. 35-36; citation, p. 35.) In fact, the state court did not make any rulings concerning the fence or any other issue but merely stayed the causes of action. (Pet. App. at p. 44a-46a.)

In addition, there is no evidence that Petitioner had the fence built to prevent officials from searching her property (a factor in *Palmieri* at 81, and in the Magistrate's findings herein; *see* Pet. App. at 36a-37a). Petitioner's sworn deposition testimony about the fence included the following:

> Q. Where was the fence being installed on your property?
>
> A. In my backyard along my wall, stone wall, existing stone wall.
>
> Q. And how far is that stone wall from the back of your house?

A. I don't know what the feet is, to be honest with you. Maybe over 75 feet.

Q. What's on the other side?

A. A lot of trees and a lot of – a lot of trees and bushes and very – just a lot of woods.

Q. Had you applied for a permit before you put up the fence?

A. No, I did not apply for a permit for the fence.

Deposition of Wendy Gennimi, p. 52, lines 10-25. Petitioner's testimony clearly demonstrates that she had a fence built in her back yard, hardly a fence intended to keep out officials from conducting "de minimis intrusions." *Palmieri* at 80-81.

There is also no evidence that Petitioner placed "no trespassing" signs on her property, despite the claims in the Statement. (Pet. App. at p. 4.)

Petitioner's statements about *Sokolov v. Village of Freeport*, 52 N.Y.2d 341, 438 N.Y.S.2d 257 (N.Y. Ct. of Appeals 1981) are also misplaced. (Pet. App. at p. 35-36.) In *Sokolov*, the New York State Court of Appeals held that a municipality could not require the owners of rental property to submit to health inspections before the property was rented. Since that decision was issued in 1981, this Court and Courts of Appeals have not found that the *Sokolov* holding prevents the type of inspections present herein. In fact, the *Palmieri* decision cited *Sokolov*. *Palmieri* at 79.

C. Jay Fain was a consultant who was properly authorized to investigate allegations of violations of the Town's wetlands laws

Petitioner argues that because the Fain respondents were not residents of the Town of Lewisboro and were not Town employees, somehow the "de minimis" inspections were violations of her Fourth Amendment rights. As the Magistrate found in his Report, "None of the case law cited by plaintiffs prohibits the Town from contracting with a private corporation to perform administrative or consultative services." (*See* Pet. App. at 39a.)

The cases cited by Petitioner regarding this issue are not applicable to Fain's activities in carrying out his duties as the Town's wetlands inspector. The holding in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022 (1971) concerned a warrant issued by the state's chief prosecutor, who later was a prosecutor at the defendant's criminal trial for murder. This Court found that the search warrant was not valid because it was not issued by a "neutral and detached magistrate." *Coolidge* at 449. In the instant matter, Jay Fain did not issue warrants or initiate prosecution of wetlands charges but instead investigated complaints and inspected properties whose owners had applied for wetlands permits.

The *Suss v. ASPCA*, 823 F.Supp. 181 (S.D.N.Y. 1993) holding is also inapplicable because it concerned whether officers of the American Society for

the Prevention of Cruelty to Animals (ASPCA) could use forced entry without a search warrant and without notifying the building owner, to rescue a cat. Herein, there is no evidence that Mr. Fain used forced entry to enter the Petitioner's property or entered the property without her knowledge (or that of her husband). (*See* Pet. App. at 39a.)

Petitioner's allegation that Fain was hired in violation of New York State Town Law § 23 and Public Officers Law § 3 is also misplaced as those statutes pertain only to elected and other "officers" of a town but not to private consultants. (*See* Pet. App. at 51a-52a.) To the extent that this issue may be relevant, as a private consultant, Fain was excluded from the reach of Petitioner's 42 U.S.C. § 1983 claims. *American Manufacturers Mutual Insurance Co. v. Sullivan, et al.*, 526 U.S. 40, 49-50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999); *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

CONCLUSION

The Second Circuit's Summary Order that affirmed the District Court's granting of summary judgment, was well reasoned and based on the applicable statutes, existing precedent and the facts. The Summary Order adopted, in large part, the Report and Recommendations of the Magistrate Judge, who thoroughly reviewed the claims of the Petitioner and other plaintiffs. Petitioner has not established any

compelling reasons for this Court to grant the Petition. Therefore, the Petition should be denied.

Respectfully submitted,

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